A

TREATISE

ON THE

LAW OF DOWER.

BY

CHARLES H. SCRIBNER.

IN TWO VOLUMES.

VOL. I.

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TO THE

MEMORY OF MY FATHER

This Work

IS

DEDICATED.

PREFACE.

In the volume now submitted to the public, I have endeavored to collect, and arrange in a convenient form, the various rules and principles of the law establishing and regulating the Right of Dower.

This subject occupies a prominent and important place in the American Law of Real Property. The right of dower was established in England more than seven hundred years ago. For centuries it was regarded there as a favorite of the law. It is not strange, therefore, especially when we consider the humane purpose it was intended to subserve, that the custom was transplanted here by the colonists, nor that we should find in the early legislation of the country evidence of an intention on their part to make it one of the permanent institutions of the land. And it has become so. With two or three exceptions, the statutes of all the United States contain provisions securing to the widow her right of dower.

In view of the general importance of the subject, and of the fact that it has necessarily given rise to many interesting legal questions, and numerous judicial decisions, in the several States, it is a matter of some surprise that, among all the legal publications issued from the press, no elementary work has heretofore appeared, professing to treat, in an extended form, upon the American Law of Dower. The English treatise of Mr. Park, republished in this country nearly thirty years since, is the only work extant which

goes fully into the subject. But even this does not profess to cover the whole ground. "It is to dower in its character of a *dormant incumbrance*," says the author in his prefatory remarks, "in a far greater degree than with a view to its remedial or possessory qualities, that the attention of the lawyer is called in the present state of practice, and to that, therefore, the compiler has directed his more laborious efforts." Upon many questions, however, relating to the *Right* of Dower, and especially with regard to those principles which are of primary importance in the common law, the treatise of Mr. Park is quite full; and a careful examination of the volume, and comparison of the text with the authorities cited, have served to impress me with a profound sense of the accurate learning and extensive legal acquirements of that writer.

But notwithstanding the value of the compilation of Mr. Park as a repository of the doctrines of the common law, it necessarily falls far short of supplying the practical wants of the American lawyer. It may relieve him, in a great degree, of the labor of consulting the ancient text-books, abridgments, and reports; but after he has informed himself respecting the rules of the common law, it still remains for him to inquire in what particulars these rules have been changed in this country, by the course of judicial decision and the force of legislative enactment. The different treatises upon the American Law of Real Property are necessarily limited in the discussion of the various topics which they embrace, and although rendering material aid in investigations of this nature, are nevertheless not sufficiently full and comprehensive to meet, at all times, the ever-varying questions constantly arising in practice. When these aids fail, resort must be had to the adjudged cases, scattered through numerous volumes of reports, or to the digests, which in themselves embrace many volumes, and which do not always state with accuracy and perspicuity the point decided, and seldom express the grounds of the decision.

The task thus imposed is exceedingly laborious, and, not unfrequently, unsatisfactory in its results.

Having on several occasions labored under the difficulties, and experienced the inconveniences above suggested, it occurred to me that a compilation of the decisions of the American courts upon the law of dower might be of service to the profession. But when I set about the collection of the materials which have been wrought into the present volume, it was with no view to the preparation of an independent work. My purpose was to incorporate the American decisions, in the form of notes, with the standard English publication above referred to. It soon became apparent, however, that this plan was, in a measure, impracticable, and would but imperfectly accomplish the object had in view. It was abandoned, therefore; and, fully conscious of my inability properly to perform the task, and with many misgivings as to the result, I nevertheless ventured to enter upon the labor of preparing for the press a new work on the Law of Dower.

At the outset of this undertaking it was feared that dissimilar statutory regulations in the several States might render it exceedingly difficult to embody, in a systematic and acceptable form, the American law upon this subject. But upon a careful analysis and comparison of the different statutes, it was ascertained that the difficulty was not so formidable as at first apprehended. It was found that, as a general rule, the various changes introduced—especially those relating to and regulating the *Right* of Dower—were not peculiar to any one State, but were common to several States; and that the conflicting laws, and decisions made under them, might be so classified and arranged as to present no serious obstacle to a consecutive and intelligible treatment of the subject.

In the plan adopted it has been thought expedient to exhibit, in convenient divisions, and under appropriate heads, the rules of the common law pertaining to the subject-

matter of the work; and in proper order and connection, to point out in what particulars these rules have been changed by statute, or judicial decisions, in the different States. In many respects the common law is entirely unchanged, and in those particulars in which modifications have been introduced, especially by statute, we can not fully comprehend the force and object of the enactment making the change, without a clear conception of the rule as it stood before any attempt at its modification. It seemed advisable, therefore, to present fully the rules of the common law relating to dower, and the principles upon which they are founded. In doing this, reference has not unfrequently been made to principles and decisions contained in the ancient books of the law. It is true that much of the matter in these old volumes is now regarded as antiquated and obsolete, and it may be conceded that a portion of it is inapplicable to this country. But it should not be forgotten that these repositories of ancient legal lore are the fountains whence is drawn a large proportion of the law of the present day. Cases may differ materially in their circumstances, while the principles which govern them remain the same. Ancient rules and decisions may not always be precisely applicable to cases arising in modern practice, yet they will generally aid us in arriving at correct conclusions, and not unfrequently furnish the principle by which a given question is to be determined. Hence, while some of the authorities referred to in the ensuing pages, and the principles established by them, may appear to have no special application to the United States, it is believed they will be found not entirely without value to the American lawyer.

I can not conclude these observations without referring, in terms of grateful acknowledgment, to the generous aid received, on more than one occasion, from those friends whose encouraging counsel in the enterprise in which I have embarked has done much to stimulate and sustain me

in its prosecution. I can only hope it may hereafter appear that these evidences of friendly regard and kindly interest were not unworthily bestowed.

In a work in which it is attempted to embody the material provisions of the legislation of thirty-four different States on the subject of dower, and to collate the various judicial decisions relating to the same subject, it would be strange if errors did not exist. But having labored faithfully to make it accurate and reliable, I venture the hope that the volume now submitted, notwithstanding its imperfections, will be received with that generous indulgence which is so eminently characteristic of the profession.

CHARLES H. SCRIBNER.

MOUNT VERNON, OHIO,
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THE LAW OF DOWER.

THE

LAW OF DOWER.

CHAPTER I.

OF THE ORIGIN AND NATURE OF DOWER.

§ 1. Introductory.
2. Supposed antiquity of dower.
3. Dower not known to the ancient Britons.
4. *Dos* of the civil law.
5. Marriage custom of the ancient Germans.
6. Similar custom of other northern nations.
7–11. Probable origin of dower in England.
12, 13. Provision for dower in the charter of Henry I.
14, 15. In *Magna Carta* of King John.
16. In the first charter of Henry III.
17, 18. In the second charter of Henry III.
19. Additional privileges secured to the widow by these charters.
20. Dower *ad ostium ecclesiæ.*
§ 21, 22. Extent to which the wife might be endowed.
23. Power of the husband over his wife's contingent dower.
24. Effect of assignment of dower *ad ostium ecclesiæ.*
25. Statutes of Merton and Gloucester.
26. Dower by the common law.
27. Dower by the custom.
28. Dower *ex assensu patris.*
29. Dower *de la pluis beale.*
30. Abolition of dower *ad ostium ecclesiæ, ex assensu patris,* and *de la pluis beale.*
31. Controversy as to the origin of dower in lands.
32, 33. Object of the provision: a favorite of the law.
34. Concluding observations.

1. The origin of the custom conferring upon the widow a right to enjoy, for the term of her natural life, a certain portion of the lands and tenements whereof her husband was seized during the coverture, (when consummate, known in legal parlance as an *estate in dower*,) is involved in so much doubt and obscurity, that an attempt to investigate its source, and trace its history with any great degree of accuracy, would be attended with but little success.[1] The most

[1] "The introduction of dower into England is of such antiquity that its origin can not be traced with any degree of certainty." Per Nott, J., in Wright v. Jennings,

learned among those who have devoted time and attention to the consideration of this subject, and favored us with the result of their researches, differ widely in their conclusions as to the real source from which the custom is derived. When we consider, in connection with this fact, that the solution of this question is of but little practical importance, inasmuch as the right of dower has long been recognized, and firmly established in the law, and the general rules and principles defining, regulating, and enforcing it, are, in a measure, well understood in practice, an effort to present, in an extended form, the conflicting views of the different authors who have discussed the question as to its origin and early history, might justly be deemed an unprofitable consumption of time. A brief notice of the subject, however, with an occasional reference to some of the writers—ancient and modern—who have treated it more at length, may be regarded as not wholly inappropriate by way of introduction to the more practical and important objects and purposes of our work.

2. The terms of entreaty in which Shechem solicited Jacob for his daughter Dinah in marriage are sometimes referred to as furnishing evidence of the great antiquity of dower: "Ask me never so much *dowry* and gift, and I will give according as ye shall say unto me; but give me the damsel to wife."[1] But the "dowry" here referred to bore no resemblance to the dower of the common law, nor the dowry of the civil law,[2] but was a gift made by the suitor to the father, or other near relative of the intended bride.[3] A similar custom was observed among the Grecians, until by a refinement of manners they began to look upon it as disgraceful. The existence of this custom was regarded by Aristotle as one proof that the manners of the ancient Greeks were barbarous, because they became the purchasers of their wives.[4]

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1 Bailey's S. C. Law Rep. 277, 278. "It is difficult to trace the origin of dower, but all writers admit it to be of great antiquity." Per Lacy, J., in Hill *v.* Mitchell, 5 Ark. 608, 610. "So ancient that neither Coke nor Blackstone can trace it to its origin." Per Catron, C. J., in Combs *v.* Young, 4 Yerg. 218.

1 Gen. xxxiv. 12; Beames' Glanville, p. 111, note; Crabb's Hist. Eng. Law, 79; 19 Amer. Jurist, (July, 1838,) pp. 292, 294.

2 See post, § 4.

3 Kitto's Cyclop. of Bib. Lit., vol. ii. p. 807, title "Marriage;" Calmet's Dict. of the Bible, by Robinson, p. 352, title "Dowry." Other scriptural allusions to this custom are referred to in the works here cited.

4 Polit. I. 2, c. 8; Crabb's Hist. Eng. Law, 79, 80.

3. It appears quite certain that dower in any form was unknown among the ancient Britons. The Welsh were unacquainted with it before the statute of Rutland;[1] nor was it established among the Irish until they adopted the English laws.[2] We are naturally led, therefore, to regard the custom as having had its origin in England at a date subsequent to the invasion of that country, and as having been introduced there by one of the nations whose iron-clad legions or rude hordes successively overrun and established themselves upon its shores.

4. It is very questionable whether our jurisprudence is, in any degree, indebted to the Roman invasion, or to Roman laws, for the establishment of the right of dower.[3] Dower is called, in Latin, by Bracton and other early English writers, *dos*. In the civil law this term imported the marriage portion which the wife brought to the husband, either in land or in money,[4] and corresponded, to some extent, with the *maritagium* of the common law.[5] The Latin term *dos*, therefore, is properly translated not by the word *dower*, but by *dowry*, things entirely different in their nature.[6] By the civil law the husband acquired only the *usus fructus* in the portion brought by his wife, during the existence of the marriage relation. Upon the dissolution of the marriage by the death of the husband, or by divorce, the entire property reverted to the wife. He could not alien the lands, but was permitted to dispose of the personalty. It was required of him, however, that upon the determination of the marriage he should restore the full value of any property disposed of by him.[7] The civil law, in its original state, had nothing that bore any resemblance to the English law of dower.[8] Yet the ancient mode of endowment at the church door, by the husband, is supposed

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[1] Enacted May 24, A.D. 1282, 10 Edw. I.; Barrington's Obs. Anc. Stat. 80; see, also, pp. 70, 71; Hale's Hist. Com. Law, ch. 9, p. 189; Crabb's Hist. Eng. Law, 160, 162; Wright's Tenures, 192, note.

[2] Dav. Rep. 136; 1 Thomas' Coke, 442, (*567,) note (A.)

[3] Crabb's Hist. Eng. Law, 79; Beames' Glanville, 111, note.

[4] 2 Bac. Abr. 356, note; 2 Bl. Com. 129; 1 Reeves' Hist. Eng. Law, 103; 1 Thomas' Coke, 442, (*567,) note (A.); Burrill's Law. Dic., *Dos*, citing Heinecc. El. Juris. Civ. lib. 2, tit. 8, § 465; see Glanville, Book 7, ch. 1.

[5] 1 Reeves' Hist. Eng. Law, 103; Co. Litt. 31, a.; Beames' Glanville, Book 7, ch. 1, and note, p. 138.

[6] Macq. H. & W. 151, note; Crabb's Hist. Eng. Law, 79.

[7] 2 Bac. Abr. 356, note, citing Vin. 249; Corvin, lib. 23, tit. 3; Honorius, 114, 115; 1 Thomas' Coke, 442, (*567,) note (A.)

[8] 2 Black. Com. 129.

by some to be derived from the *donatio propter nuptias* of the Roman law, and Bracton calls it expressly by that name.[1]

5. Many writers concur in ascribing the origin of dower in England to the Germans. Among that people the converse of the rule of the civil law prevailed, and it was a doctrine with them that a woman should bring no fortune in marriage, but the husband was required, at the time of the espousals, to bestow a portion of his property upon his wife.[2] In describing the customs of the ancient Germans, Tacitus says:[3] "The bride brings no portion; she receives a *dowry* from her husband. In the presence of her parents and relations he makes a tender of part of his wealth; if accepted, the match is approved. In the choice of the presents female vanity is not consulted. There are no frivolous trinkets to adorn the future bride. The whole fortune consists of oxen, a caparisoned horse, a shield, a spear, and a sword. She in return delivers a present of arms, and by this exchange of gifts the marriage is concluded." From this quotation it is to be understood that the property given by the husband consisted in personalty; and Sir Martin Wright has remarked that among the Anglo-Saxons the dower right was confined to this species of property, and that there were no footsteps of dower in lands until after the Norman Conquest.[4] We shall have occasion to inquire, as we proceed, whether, upon this point, the learned writers referred to in the note are not in error.[5]

6. We are told, also, that a custom similar to that attending the marriage ceremony of the ancient Germans existed among the Goths,[6] and a learned writer shows it to have formed a part of the laws of the Visigoths and Burgundians.[7] Another author, whose views are entitled to consideration, is of opinion that the English would probably borrow such an institution from the Goths and Swedes, rather than from any other of the northern nations.[8]

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[1] Burrill's Law Dict., *Dower;* Long's Discourses, 99–102; Bracton, fol. 92, b.; see Crabb's Hist. Eng. Law, 79.

[2] 1 Greenl. Cruise, p. 164, (*151,) § 1; 1 Thomas' Coke, 442, (*567,) note (A.); Hein. Elem. Jur., ch. 1, s. 5; 4 Kent, 36, note a.; Lambert on Dower, 10.

[3] De Mor. Germ. 18, Murphy's translation.

[4] Wright's Ten. 191, 193, quoting Lord Bacon's Hist. Eng. Gov. 104, 146, 147; 4 Kent, 36, note; Stearns' Real Act, 274.

[5] Post, §§ 9–13.

[6] Olaus Magnus; 4 Kent, 36, note; Beames' Glanville, 112, note.

[7] Stuart's View of Society; 4 Kent, 36, note.

[8] Barrington's Obs. Anc. Stat. 9, 10; 4 Kent, 36, note. "The laws of Henry I.

7. It seems generally agreed, however, that many of the old English customs are to be traced to and in fact were introduced by the Anglo-Saxons, and that the people of England are indebted to their German ancestors for much that is valuable in their constitution and laws.[1] It appears highly probable that in the marriage custom described by Tacitus[2] we have the origin of the right of dower in England; for it is not unreasonable to suppose that when those northern nations established themselves in the southern parts of Europe they carried their customs with them; nor that, when a permanent interest was acquired in lands, the dower of the widow was extended and applied to real estate.[3] Neither would it be strange, if, when they came to reduce their customs to writing, they fixed the portion of the husband's lands which he might allot for his wife's dower.[4] The Longabardic Code directed that it should consist of a fourth part, and the Gothic of a tenth.[5] It is also said that the Saxons on the Continent allowed the wife the half of what the husband acquired, besides the dower which was assigned to her at the marriage.[6]

8. The precise time when dower in *lands* was introduced cannot be ascertained. Blackstone[7] is of opinion that it was entirely unknown in the early part of the Saxon constitution, and he states that in the laws of King Edmond the wife is directed to be supported wholly out of the personal estate. That dower in lands was known during the reign of Canute the Dane, who ascended the throne A.D. 1017,[8] seems very clear from a quotation furnished by Sir Matthew Hale from one of the laws of that prince: "Among the laws of King Canutus, in Mr. Lombard, (Fo. 122, 123,) is this law, viz., No. 68. 'Sive quis incuria sive morte repentina fuerit intestato mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure

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allowed a woman a third for her dower; which corresponded with what was allowed by the Sicilians and Neapolitans, and after them by the Normans and Scotch.—LL. Hen. I., c. 70; Grand Cont. de Norm. c. 102; Reg. Maj. 1, 2, c. 16." Crabb's Hist. Eng. Law, 80; Beames' Glanville, 112, note.

[1] 1 Black. Com. 35, 36; Murphy's Tacitus, xlvi., note 2.

[2] Ante, § 5.

[3] Stuart's View of Society, 29, 30, 223–227; 4 Kent, 33, note a.; 1 Greenl. Cruise, p. 164, (*152,) §§ 1, 2; 1 Thomas' Coke, 442, (*567,) note (A.); Lambert on Dower, 10.

[4] 1 Greenl. Cruise, p. 164, (*152,) § 1.

[5] Ibid.; Beames' Glanville, 112, note.

[6] Crabb's Hist. Eng. Law, 80, citing LL. Sax. tit. 8.

[7] 2 Com. 129, citing Wilk. 75.

[8] 1 Hume, 80. He died A.D. 1035; Ibid. 83, 84.

debetur hereoti nomine) sibi assumito. Verum eas judicio suo uxori, liberis & cognatione proximis juste (pro suo cuique jure) distributo.' Upon which law we may observe these five things, viz.: First, that the wife had a share *as well of the lands*, for her dower, as of the goods."[1] According to the Danish historians, dower was introduced into Denmark by Swein, the father of Canute, out of gratitude to the Danish ladies who sold all their jewels to ransom him when taken prisoner by the Vandals,[2] and Blackstone suggests that dower in lands may possibly be with the English the relic of a Danish custom.[3] Perhaps the law of King Canute above referred to may give some plausibility to this supposition.

9. But whatever the fact may be with regard to the Danish custom, it is certain that dower in lands, in some localities at least, was known to the Saxons. Cruise says that by the laws of King Edmund, whose reign commenced A.D. 941,[4] a widow was entitled to a moiety of her husband's property for life, but which she forfeited by a second marriage.[5] And he refers to a Saxon charter found in the Appendix to Somner's Gavelkind, entitled *Chirographum Pervetustum de Nuptiis contrahendis et dote constituendâ*, in which particular *lands*, together with thirty oxen, twenty cows, ten horses, and ten bondmen are appointed for the wife's dower. Blackstone also shows that in gavelkind tenure the widow was entitled to a conditional estate in one-half the lands of her husband, the condition being that she should remain chaste and unmarried.[6]

10. Were it not for the uncertainty relating to the period when the "Mirror of Justices" was written, there are passages contained in that book which might assist in determining the question as to the date of the introduction into England of dower in real estate. Among the ordinances said to have been made by the estate of the realm, composed of the Earls of the kingdom who were accustomed to assemble at London under the regulations established by King Alfred,[7] is the following:[8] "It was ordained, That every one might

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[1] Hale's Hist. Com. Law, 251. See Barrington's Obs. Anc. Stat. 10.

[2] 2 Black. Com. 129, citing Mod. Un. Hist. xxxii. 91.

[3] Ibid. [4] 1 Hume, 58.

[5] 1 Greenl. Cruise, p. 164, (*152,) § 2; Crabb's Hist. Eng. Law, 80, citing LL. Edm. c. 2, apud Wilk.; Beames' Glanville, 112, note.

[6] 2 Com. 129, citing Somner's Gavelk. 51.

[7] Mirror of Justices, 6–15. [8] Ibid. p. 11.

endow his wife *ad ostium ecclesiæ*, or of the monastery, without the consent of his heirs; that heir females nor widows should not marry themselves without the assent of their lords, because the lords were not bound to take the homages from their enemies or other unknown persons, and the same is forbidden upon pain of forfeiture whether their parents were consenting thereunto or not; and that widows, in case they marry without the consent of the guardians of the lands, should lose their dowries; that those also should be disinherited or lose their dowries that married before. Widows, nevertheless this, should not forfeit their inheritance for whoredom, and that the eldest son should forfeit nothing to the prejudice of his ancestors nor his heirs, living the ancestor whose heir apparent he is." The date of this ordinance is not given, and the period when the book itself was written is a disputed point. By some it is pronounced older than the Conquest.[1] Others have ascribed it to the time of Edward II.[2] It seems probable, as suggested by Mr. Reeves,[3] that both these opinions are partly right, and that a writer in the latter part of the time of Edward I., or early in the reign of Edward II., took an ancient volume bearing the name of the "Mirror," and worked it into the book we now have, promiscuously blending the antiquated law with that of the time in which it was revised. A very cursory examination of the book will show that a considerable portion of it, at least, was prepared at a period long posterior to the Conquest.[4] There is good reason, however, to believe that other portions of it belong to a much earlier date, and it is not unlikely that the ordinance above quoted should be included in this category. For while many things contained therein are, in substance, carried into the Great Charter, yet the author positively declares that the ordinances to which he there refers "were not put into writing and certainly published,"[5] which is not true of the Great Charter. The points of resemblance between the ordinances recited in this work and *Magna Carta* are susceptible of simple and reasonable explanation. "For," says Blackstone, "it is agreed by all our historians that the Great Charter of King John was for the most part compiled *from the ancient customs of the realm*, or the laws of King Edward the Con-

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[1] By Lord Coke and Nathaniel Bacon. See 2 Reeves' Hist. Eng. Law, 358, note.

[2] See Barrington's Obs. Anc. Stat. p. 8; 2 Reeves' Hist. Eng. Law, 358.

[3] 2 Reeves' Hist. Eng. Law, 358 et seq.

[4] See pp. 251 to 284, inclusive.

[5] Page 6.

fessor, by which they usually mean the old common law which was established under our Saxon princes, before the rigors of feudal tenure and other hardships were imported from the Continent by the kings of the Norman line."[1] If any of the ordinances set forth in the Mirror sprung from *Magna Carta*, or if that instrument were in existence when the original work was written, it is exceeding strange that no allusion is made thereto in that part of the text to which we have above particularly referred. We shall notice, as we proceed, that even in the Great Charter of Henry I. the right of dower in lands is recognized as a known existing institution, rather than as being created thereby;[2] for, while distinct allusion is made to the custom, there is no attempt to define the extent of the right, nor to declare in what it shall consist.

11. Previous to the granting of the English charters, the judicial code consisted of that collection which had probably been commenced by Alfred, continued by Canute and Edgar, and completed and established by Edward the Confessor.[3] After the subjugation of the Danes by Alfred, about A.D. 877 or 890, three systems were in use in England. Northumberland, in which the Danes settled, was governed by a peculiar law called the Dane-Lage; Alfred compiled another code, entitled West-Saxon-Lage, for the province of Wessex; and the local constitutions of the kingdom of Mercia were observed in the counties nearest to Wales, and called Mercen-Lage.[4] In the reign of Edgar, about A.D. 966, these different systems were formed into one body common to all England. The statutes thus established were confirmed by Canute, and the whole system was completed by Edward the Confessor, about A.D. 1065, and to the latter prince is attributed the revival of the Anglo-Saxon judicature at that date, which was only about one year prior to the Norman Conquest. It was these ancient customs of the realm, thus moulded into a general system of laws, that the English were so desirous to have restored after the Conquest,[5] and which constituted the basis and substance of the charters eventually exacted by them from the princes of the

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[1] Intro. to the Charters, Black. Law Tracts, 289. Mr. Barrington dissents from this doctrine, and maintains that the clergy and barons who were active in procuring the charter had every motive to, and did preserve their rights under the feudal laws introduced with the Conquest.—Obs. Anc. Stat. 7–9.

[2] Post, §§ 12, 13.

[3] Thomson's Charters, 396.

[4] Thomson's Charters, 396.

[5] Ibid. 397.

Norman line.[1] As all these charters recognize dower in lands as an existing legal right, it is reasonable to suppose that it did, in fact, form one of the ancient customs of the Anglo-Saxons, and was afterwards adopted by the Normans as one of the legal institutions of the land.[2]

12. William the Conqueror confirmed a portion of the laws of Edward, not, however, without making some alterations therein.[3] He died in the year 1087, and was succeeded by William Rufus. No concessions were obtained from this king, but about the year 1101, in the next reign, was published the celebrated charter of Henry I.[4] That part of the charter which relates to dower is as follows: "Et si mortuo viro uxor ejus remanserit, et sine liberis fuerit, dotem suam et maritationem habebit, et eam non dabo marito nisi secundum velle suum. Si vero uxor cum liberis remanserit, dotem quidem et maritationem habebit, dum corpus suum legitime servaverit; et eam non dabo nisi secundum velle suum."[5] "And upon the death of a man, if his wife be left *without* children, she shall have her dower and marriage portion; and I will not give her again in marriage excepting by her own consent. But if the wife be left *with* children, she shall then have her dower and marriage portion whilst she lawfully preserves her body; and I will not dispose of her in marriage but according to her own will."[6]

13. Thus, after the lapse of about thirty-five years only, from the date of the Conquest, we find, in a charter granted by the sovereign of the realm to conciliate a people who were importuning him for a restoration of their ancient customs, an explicit recognition of the right of dower. It is hardly probable that a provision so general in its terms was intended solely for lands held in gavelkind, unless, indeed, as Mr. Selden supposes, that tenure, before the Conquest, was a general custom of the realm.[7] The opinion that dower in lands was generally known throughout the kingdom anterior to the Conquest seems to be supported by the fact that so recently thereafter, a recognition of the right was incorporated into an instrument of so much importance as the great charter of Henry I. And Mr. Cruise

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[1] Ante, § 10.

[2] 1 Thomas' Coke, 442, (*567,) note (A.); 1 Greenl. Cruise, p. 164, (*152,) § 2.

[3] Thomson's Charters, 398; see, also, pp. 2, 3.

[4] Ibid. 400; 1 Hume, 168.

[5] Bl. Intro. to the Great Charters, Law Tracts, 286, note d.; Anc. Laws, vol. i. p. 499.

[6] Thomson's Charters, 403.

[7] 2 Black. Com. 84.

unhesitatingly expresses himself of that belief.[1] The charter of Henry I. was confirmed by Stephen, and afterward by Henry II.[2]

14. *Magna Carta* of King John, which is popularly known as *The* Great Charter, was granted June 15th, 1215,[3] or about one hundred and fourteen years after the charter of Henry I. In the interim was composed the *Tractatus de Legibus et Consuetudinibus Regni Angliæ* of Glanville, the sixth book of which is upon the subject of dower. This treatise was written during the reign of Henry II., and probably about A.D. 1187.[4] From this work it appears that the mode of endowment then in common use was *ad ostium ecclesiæ*, or at the door of the monastery.[5] Indeed, Mr. Reeves says the term *dos* or *dower*, in its common and usual sense, signified that property which a freeman gave his wife, *ad ostium ecclesiæ*, at the time of the espousals.[6] We have already seen that, according to the "Mirror of

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[1] 1 Greenl. Cruise, p. 164, (*152,) sec. 2.

[2] Thomson's Charters, 409.

[3] Black. Chart. xi.; Thomson's Chart. 63.

[4] 1 Reeves' Hist. Eng. Law, 223; see Barring. Obs. Anc. Stat. p. 3, note.

[5] Lib. 6, c. 1.

[6] 1 Hist. Eng. Law, 100; and see 4 Kent, 36; 1 Greenl. Cruise, p. 164, (*152,) sec. 3; 1 Thomas' Coke, 442, note (A.) In the *Liber de Antiquis Legibus*, reference is made to a charter of Robert de Gant of 1168, in which tenure in dower is thus described: "Avicia, mater Willelmi de Curci, *tenet feoda duorum militum.*" Pref. *Liber de Antiquis Legibus*, Camden Soc. Pub. lvi. In the same publication we have the following account of the book here referred to: "The manuscript known as the Liber de Antiquis Legibus, now deposited in the Record Room, Town Clerk's Office, at the Guildhall of the City of London, is a small folio, nine inches and a half in length, and seven inches in breadth, the binding of white leather, covering wooden backs, and containing 159 leaves of parchment, paged continuously with Arabic cyphers. The index prefixed to the volume indicates the successive chapters which it was originally intended should compose the volume; but the first chapter and three others in the body of the manuscript were left blank, though since written over by matter of later insertion. The original portion of this manuscript will have been written throughout in Latin in the year of our Lord 1274, 2 Edward I., and the remainder added at different intervals in French, which later date will also apply to the references in the margins. A considerable portion of this volume is filled with extracts from the Gesta Regum Anglorum of William, the monk of Malmsbury, under titles of the writer's own composition. At the top of the page, the reverse of folio 63, commence the Chronicles of the Mayors and Sheriffs of London, and the events which occurred in their times from the year 1188 to the year 1274, up to the month of August, the preparations for the coronation of Edward I., who landed at Dover the 2d of that month, being the subject-matter of the closing paragraphs of this valuable portion of its contents. The title of the Book of Ancient Laws is only applicable to the chapters 38 and 44; the first of which contains the regulations prescribed by the name of Assize, as to the inhabitants of London in respect of their

Justices," this was the description of dower ordained in the time of the ancient English kings.[1] And the same author complains "that no woman is dowable if she have not been solemnly espoused at the door of the monastery, and *there* endowed," and that *Magna Carta* is defective in failing to provide a remedy for this injustice.[2] The changes wrought in this species of dower during succeeding reigns, including the adoption of the remedy suggested by the Mirror, we will note hereafter.

15. Chapter VII. of the Great Charter of King John is as follows: "Vidua, post mortem mariti, sui statim et sine difficultate, habeat maritagium et hæreditatem suam; nec aliquid det pro dote sua, vel pro maritagio suo, vel hæreditate sua, quam hæreditatem maritus suus et ipsa tenuerint die obitus ipsius mariti; et maneat in domo mariti sui per quadraginta dies post mortem ipsius, infra quos assignetur ei dos sua."[3] "A widow, after the death of her husband, shall immediately, and without difficulty, have her marriage and her inheritance; nor shall she give anything for her dower, or for her marriage, or for her inheritance, which her husband and she held at the day of his death: and she may remain in her husband's house forty days after his death, within which time her dower shall be assigned."[4]

16. The first charter of Henry III. bears date November 12th,

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buildings and dwellings, and the second the Provisions made by the Lord Henry, the King, son of King John, and his Council, to amend the English laws, of which the larger portion had been ordained in the time of the Earl of Leicester, in the year of the Lord 1264, after the battle of Lewes, fought on Wednesday, the fourteenth day of May." Ibid. p. 1.

[1] Ante, sec. 10; Mirror of Justices, p. 11.

[2] Pp. 253, 254.

[3] Black. Charters, xiii.; Thomson's Charters, 68.

[4] Thomson's Charters, 69. Of date 5th November, 1212, are Letters Close to the sheriffs of Hertford and Kent, respecting the lands of Henry Fitz-Aylwin, in this form: "Rex Vicecomiti Hertfordie, etc. Precipimus tibi quod omnes terras unde Henricus filius Ailwini Major Londoniarum in Ballia tua saisitus fuit anno et die quo obiit, unde Willelmus Aguillun habuit saisinam, capias in manum nostram *exceptis terris que pertinent ad dotem uxoris predicti Majoris.*" Pref. *Lib. de Antiq. Leg.* Camd. Soc. Pub. xii.; see ante, § 14, note 6. On the 17th day of the same month the sheriff of Hertford, the sheriff of Surrey, the mayor and sheriffs of London, and the sheriff of Kent, by Letters Close before the Barons of the Exchequer, were commanded without delay to cause Margaret, who had been the wife of Henry Fitz-Aylwin, late mayor of London, to have her reasonable dower, which was belonging to her, of the lands and tenements which had been those of the same Henry, late her husband, in their bailiwicks. *Ibid.*

A.D. 1216.[1] Chapter VII. of King John's charter is retained verbatim, but there is added thereto the following provision: "Nisi prius ei fuerit assignata vel nisi domus illa sit castrum et si de castro recesserit statim provideatur ei domus competens in qua possit honeste morari quousque dos sua ei assignetur secundum quod predictum est."[2] "Unless it shall have been assigned before, or excepting his house shall be a castle; and if she departs from the castle, there shall be provided for her a complete house in which she may decently dwell, until her dower shall be assigned to her as aforesaid."[3] It will be observed that in neither of the foregoing charters is any mention made as to what *proportion* of the husband's lands shall be assigned for the widow's dower; nor as to whether she shall be endowed of all lands held by him during the coverture, or simply of those held at the time of the espousals.

17. This omission, however, is supplied in the second charter of Henry III.,[4] which was granted in the following year.[5] The entire chapter above transcribed, as confirmed by the first charter of Henry III., was incorporated into this instrument, together with this additional clause: "Et habeat rationabile estuverium suum interim de communi. Assignetur autem ei pro dote sua tercia pars totius terre mariti sui que sua fuit in vita sua, nisi de minori dotata fuerit ad ostium ecclesie."[6] "And she shall have her reasonable estover within a common term. And for her dower shall be assigned to her *the third part of all the lands of her husband, which were his during his life*, except she were endowed with less at the church door."[7] The original text was also changed in one other respect.

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[1] Thomson's Charters, 105; Black. Charters, xxvi.

[2] Black. Charters, xxviii. c. 7.

[3] Thomson's Charters, 108, 109.

[4] It appears, also, that by a law of Henry I. the widow's dower was fixed at one-third.—LL. Hen. I. ch. 70; Crabb's Hist. Eng. Law, 80.

[5] Black. Charters, xxxv.; Thomson's Charters, 118. The Book of Ancient Laws, before referred to, contains the following order for the assignment of dower, made in the same year that this charter bears date—1217: "*De dote.*—Mandatum est Roberto de Cardinania quod nisi Comes de Insula sine dilatione plenariam seisinam faciat Falkesio de Breanté *et Margarete uxori ejus de rationabili dote* que ipsam Margaretam contingit per Baldwinum de Insula, quondam virum ipsius Margarete et filium ipsius Comitis, tunc dotem suam eis habere faciat sine dilatione *secundum consuetudinem regni Anglie.* Et quum, etc. Teste ipso Comite apud Oxoniam xx. die Februarii." Pref. *Lib. de Antiq. Leg.* Camd. Soc. Pub. lvii.

[6] Black. Charters, xxxvii. c. 7; 2 Coke's Inst. 16, cap. 7.

[7] Thomson's Charters, 121.

It was declared that the widow might remain in the *principal messuage* of her husband for forty days after his death, instead of "his *house*," as before provided.[1] A third charter was obtained from Henry III., bearing date February 11th, 1224,[2] but the chapter relating to dower was not changed in any particular.[3] A charter was also granted by Edward I., October 12th, 1297,[4] but no variation was made thereby in the right of dower.[5]

18. The Great Charter of King John, as amended and confirmed in the reigns of Henry III. and Edward I., is that usually prefixed to the various editions of the English statutes,[6] and the same given in Coke's Institutes.[7] Mr. Cruise says that nothing is mentioned in King John's *Magna Carta*, nor in the first charter of Henry III. respecting dower.[8] This is manifestly an error, for, as we have seen,[9] the right of dower is expressly recognized in both these charters. But it is true that in neither of them is there anything said as to the *extent* to which the widow might be endowed, and perhaps it is this omission to which that writer refers. And when Chancellor Kent observes that "in *Magna Carta* (c. 7) the law of dower in its modern sense and enlarged extent, as applying to all the lands of which the husband was seized during the coverture, was clearly defined and firmly established,"[10] it is obvious that he does not refer to *Magna Carta* proper of King John, but to that instrument as it was amended and confirmed in the time of Henry III.

19. The word *maritagium*, as it occurs in the original text, is a technical expression of peculiar signification. Before the Norman

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[1] Thomson's Charters, 121.

[2] Black. Charters, xliv.; Thomson's Charters, 38, 131. "On the Fine Roll of the 9th Hen. III., (1224,) under the heading 'Pro Margareta que fuit uxor Falcasii,' we have a copy of a precept to Thomas de Cyrences, that he take with him honest and lawworthy men of the vicinity of Buckland, Bickleigh, Walkhampton, and Colyton, which manors William, Earl of Devon, had assigned in dower to Margaret de Reviers, when Baldwin his son married her, and by their view and testimony, cause all the corn growing upon the land of the said manors to be valued, and if the said Margaret was willing to receive the corn at the same price, to answer thereof to the king at the terms appointed by him, then to leave to her the aforesaid corn; and if not, then retaining the aforesaid corn to the king's use, to cause the aforesaid Margaret to have seizin of the said manors, having first taken security from her as to the safe custody of the said corn; and which is dated from Winchester, 11th day of March." Pref. *Lib. de Antiq. Leg.* Camd. Soc. Pub. lix.

[3] Thompson's Charters, 134. [4] Ibid. 145. [5] Ibid. 148.

[6] Ibid. 394. [7] 2 Inst. 1.

[8] 1 Greenl. Cruise, p. 165, (*152,) sec. 4; see, also, 1 Washb. R. P. p. 147, note 6

[9] Ante, §§ 15, 16. [10] 4 Com. 36.

Conquest a widow had no power to marry again until the expiration of one year after the death of her husband.[1] Coke says it was certainly the law of England before the Conquest that a widow should continue a whole year in her husband's house, within which time her dower was to be assigned her.[2] A similar restriction as to marriage is said to have prevailed in Denmark and Sweden, and anciently in Germany.[3] By the civil law widows were forbidden to marry within ten months after their husbands' decease.[4] But when it was declared by the Great Charter that "a widow, after the death of her husband, shall *immediately*, and without difficulty, have her marriage and her inheritance," the then existing restriction upon marriage in England was at once and forever removed.[5] The widow was permitted to tarry forty days in the principal messuage of her husband, and this was called her *quarantine;* although she was privileged to marry again within that period, yet if she did so, her widowhood was past and she lost her quarantine.[6] The fine which, under the feudal system, was exacted from the widow by the lord, for the assignment of her dower, was also abrogated by *Magna Carta.*[7]

20. If, as has been supposed by some writers, the rule among the Saxons entitled the widow to a moiety of her husband's lands for her dower,[8] it was greatly modified in England at some period prior to the reign of Henry II. We have already observed that during that reign the dower in common use, as stated by Glanville, was *ad ostium ecclesiæ.*[9] By that mode of endowment the widow was not permitted to take more than one-third the lands held by the husband at the time of the *espousals.* He might endow her with *less.* If he attempted to bestow more, the law reduced the endowment to one-third. If he endowed her generally of all his lands, without naming the specific lands or proportion assigned her, she was then entitled to one-third of the freehold of which he was seized at the time of the

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[1] Thomson's Char. 172.

[2] Co. Litt. 32, b.

[3] Thomson's Char. 172; Barrington's Obs. Anc. Stat. 8–10, 5th edition.

[4] L. 2 Cod. de sec. Nuptiis; Taylor's Elem. Civil Law, 348 *et seq.;* Cooper's Justinian, 427, notes; Adams' Roman Antiq. 335, 7 N. Y. ed.

[5] 2 Inst. 18; Thomson's Char. 172.

[6] Co. Litt. 32, b., 34, b.; 9 Vin. Abr. 272, tit. Dower, (I. a.) pl. 2. Mr. Thomson says she thereby forfeited her *dower*, Char. 172. In this he is evidently mistaken.

[7] Cap. 7; 2 Bl. Com. 135.

[8] See ante, §§ 6, 9; 1 Greenl. Cruise, p. 164, (*152,) sec. 2, and p. 167, (*154,) sec. 8.

[9] Ante, § 14; Glanville, Lib. 6, c. 1.

marriage. This was termed her *dos rationabilis*, or reasonable dower.[1] If a man had but a small freehold at the time of the espousals, he might afterwards augment the dower to a third part out of purchases subsequently made; but this required a special engagement before the priest to endow her of his future acquisitions, and if no such engagement were made, although the husband had then but a small portion of freehold, and afterwards made large acquisitions, the widow received no benefit from the latter.[2] And if a husband had no lands, an endowment in goods, chattels, or money, at the time of the espousals, was a bar of any dower in lands which he afterwards acquired; for it was a general rule that where dower was specially assigned *ad ostium ecclesiæ*, the widow could demand no more than what was then and there assigned.[3]

21. The second charter of Henry III. provided that the widow should be endowed of one-third of all the lands of her husband, which were his during his life, *except* she were endowed with less at the church door.[4] The consequence of this exception was, that if the husband endowed his wife *ad ostium ecclesiæ*, she was limited to such lands as were specifically assigned to her, not exceeding one-third of his entire freehold, or if the endowment were general, then to the third part of the freehold which the husband held in demesne on the day of the espousals.[5] It was only where there was no endowment at the time of the marriage that the widow could claim her dower in all the lands held by the husband during the coverture. Indeed Bracton, whose *De Legibus et Consuetudinibus Angliæ* is supposed to have been written after the forty-sixth year of Henry III.,[6] notwithstanding the provision of *Magna Carta*, before referred to, in his definition of the right of dower, says it must be "the third part of all the lands and tenements which a man had in his demesne and in fee, of which he could endow his wife *on the day of his espou-*

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[1] 1 Reeves' Hist. Eng. Law, 100-2; 2 Black. Com. 133-4; Glanville, Lib. 6, c. 1; Bract. Lib. 2, c. 30, § 6; 4 Kent, 36; 1 Greenl. Cruise, p. 164, (*152,) sec. 3; Co. Litt. 33, b.

[2] Glanv. Lib. 6, c. 1; Brac. Lib. 2, c. 39, § 6; 1 Reeves' Hist. Eng. Law, 101; 2 Black. Com. 134.

[3] Glanv. Lib. 6, c. 2; 2 Bl. Com. 134; 1 Reeves' Hist. Eng. Law, 101; 1 Greenl. Cruise, p. 164, (*152,) sec. 8.

[4] Cap. 7; ante, § 17.

[5] 2 Bl. Com. 134; Glanville, Lib. 6, ch. 2.

[6] 1 Reeves' Hist. Eng. Law, 90.

sals."[1] A similar rule is said to be contained in the 101st chapter of the Grand Constumier of Normandy,[2] a work supposed to have been produced a short time after the publication of the treatise of Bracton.[3] But Littleton expressly lays it down as the common law rule in the time of Edward IV. that the wife should have for her dower one-third of the lands which were her husband's during the espousals;[4] also that she should have her election after her husband's death to accept the dower assigned her at the church door, or refuse it, and claim her dower at common law.[5] He further says that a man might endow his wife *ad ostium ecclesiæ*, of the whole, the half, or any lesser part of his lands,[6] which is manifestly a change in the law as it existed in the time of Glanville.[7]

22. It is to be observed that in enlarging the right of dower, *Magna Carta*, as altered and confirmed by Henry III., extends it to lands held by the husband during his *lifetime*.[8] This expression appears never to have been taken literally, but has always been understood to mean the lands held by the husband during the *coverture*.[9] Any other construction would have involved titles to real estate in singular uncertainty and confusion. Formerly, also, the capital messuage was exempt from dower, and was to remain whole and undivided.[10]

23. Although a woman had no power, during the life of her husband, to dispose of her inchoate interest in the lands of which she had been endowed *ad ostium ecclesiæ*, yet the husband might alien his wife's dower interest in any manner he saw proper. If, however, the wife declared her dissent therefrom, she might claim her dower after her husband's death, and upon proof of such dissent could recover it against the purchaser. In such case, also, the heir was bound to deliver to the widow the specific dower assigned her, if he could; if he could not procure the identical land, he was to make her a recompense equal in value; and if he delivered to her the land which had

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[1] Fol. 92; 1 Reeves' Hist. Eng. Law, 312.

[2] 2 Bl. Com. 133; 1 Greenl. Cruise, p. 165, (*152,) sec. 3.

[3] 1 Reeves' Hist. Eng. Law, 224.

[4] 1 Inst. sec. 37.

[5] 1 Inst. sec. 41; 2 Bl. Com. 134.

[6] 1 Inst. sec. 39.

[7] Co. Litt. 36, a.

[8] Cap. 7; 2 Bl. Com. 134; 1 Greenl. Cruise, p. 165, (*152,) sec. 4.

[9] 2 Inst. sec. 37; 1 Reeves' Hist. Eng. Law, 242; Beames' Glanville, 113, note; 4 Kent, 36.

[10] 1 Reeves' Hist. Eng. Law, 102.

been sold, he was in like manner bound to recompense the purchaser.[1]

24. Where dower was specifically assigned *ad ostium ecclesiæ*, the wife, after the death of her husband, might enter upon the lands of which she had thus been endowed without any further assignment.[2] And this was greatly to her advantage, for thereby she was relieved

[1] 1 Reeves' Hist. Eng. Law, 101–2; Crabb's Hist. Eng. Law, 81; Glanv. Lib. 6, c. 3, 13. Mr. Beames maintains that, according to the true rendering of the text of Glanville, the widow was not permitted to recover her dower as against a purchaser from her husband. The following is his translation of the passage in question: "And so far is the woman bound to obey her husband, that if her husband chooses to sell her dower, and she refuses her consent, and the dower be afterwards sold and bought under these circumstances, the wife can not, after the death of her husband, claim her dower as against the purchaser, if she confess in court, or is convicted upon the fact that, although she opposed her husband, the dower was sold by him." To this he subjoins the following note: "I have followed all the MS. and the edition of Glanville published in 1604, in admitting *not* into the text. I submit that this reading is sanctioned, not merely by the previous part of this present chapter, but also by the 13th chapter of the present book. Yet the *Regiam Majestatem* makes the validity of such a sale to depend upon the wife's consent—but, if she made no opposition to it, it seems to have been tantamount to a positive consent, (L. 2, c. 15, 16.) From considering the 13th chapter of the present book, one thing seems clear—that in case the husband disposed of his wife's dower, the heir was bound to render an equivalent to the purchaser, if the land was recovered from him, or to the wife, if it was not so. As to the heir, therefore, it was immaterial; and so, perhaps, it might be considered with respect to the wife and purchaser in case the heir, as heir, was solvent; but if otherwise, it was highly material to ascertain whose right, that of the wife, or that of the purchaser, was paramount. Bracton is more explicit than our author; and from him we collect that a distinction should be made whether the dower was originally *named* or not. In the *former* case the woman could pursue the identical dower, and wrest it from the hands even of a purchaser. In the *latter* she was obliged to resort to the heir for an equivalent. In the first case, from the moment the dower was named, the woman acquired a certain *jus et dominium*, as Bracton expresses it, in the property, which accompanied it into whatever hands it afterwards went, and gave her the right of following and reclaiming it. But, if the endowment were general, and no particular land specified, the wife did not acquire any immediate right, on account of the uncertainty, it being questionable what identical allotment would fall to her share until the assignment took place, (Bracton, 300, b.)" Beames' Glanville, 117, note. In this connection, and as reflecting some light upon this controverted point, I also reproduce chapter 13 of the sixth book of Glanville, as translated by the same writer: "It must also be understood, that if the husband of any woman, after having endowed her as his wife, should sell her dower to any one, his heir shall be obliged to deliver the dower to the woman, if he possibly can; at the same time he shall be bound to render a reasonable equivalent to the purchaser on account of the sale or gift of his ancestor. If, however, the heir be unable so to do, he shall be bound to make to the woman a reasonable compensation."

[2] 1 Inst. § 39.

of the burdens and delays incident to a suit to recover her dower, in the prosecution of which, as Coke says, "her life might be spent, together with her money also;"[1] for although it was provided by *Magna Carta* that dower should be assigned her within forty days after her husband's death, yet until the passage of the statute of Merton there was no penalty inflicted nor damages awarded for withholding the dower, and consequently the widow was frequently subjected by the tenant to unjust delays and oppressive litigation.[2]

25. The statute of Merton was passed in the 20th of Henry III.[3] Chapter I. was expressly designed to remedy the injustice noticed in the preceding section. By Bracton it is called *Nova Constitutio*.[4] It was therein provided that the wife should recover damages in her writ of dower from the time of the death of her husband; and moreover that persons convicted of deforcing widows of their dower should be in *misericordiâ* to the king.[5] Before the making of this statute, it had been an open question whether the tenant in dower might lawfully bequeath the grain which she had sown, or whether it should go to the reversioner with the lands. Chapter II. removed this doubt, and declared in favor of the widow that she might bequeath the growing crop upon the lands held in dower. And this provision extended to all descriptions of dower.[6] Although the statute of Merton gave to the widow damages for the detention of her dower, yet it did not permit her to recover costs; but by the statute of Gloucester, passed in the 6th of Edward I., costs were given her also.[7]

26. Littleton tells us that formerly there were five kinds of dower, namely, dower *ad ostium ecclesiæ*, dower by the common law, dower by the custom, dower *ex assensu patris*, and dower *de la pluis beale*.[8] Dower *ad ostium ecclesiæ*, and dower by the common law we have already noticed.

27. Dower by the custom was where, by the custom of any particular locality, the widow was entitled to a peculiar and unusual allotment of dower. In some places the whole land was assigned her; in others one-half, and in others again, the one-fourth.[9]

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[1] Co. Litt. 34, b.
[2] Ibid. and 32, b.; Reeves' Hist. Eng. Law, 261.
[3] 2 Inst. 79, 80.
[4] Lib. 4, 312, and lib. 2, 96; Co. Litt. 32, b.
[5] Co. Litt. 32, b.; 1 Reeves' Hist. Eng. Law, 261; Stat. of Merton, cap. 1; 2 Inst. 80.
[6] 2 Inst. 80, 81; 1 Reeves' Hist. Eng. Law, 262.
[7] Co. Litt. 32, b. note 4. This statute is set out at length in 2d Inst. pp. 277 to 330 inclusive.
[8] Sec. 51.
[9] Litt. § 87; 1 Greenl. Cruise, 167, (*154,) §§ 7–10.

28. Dower *ex assensu patris* was where the father, being seized of lands in fee, permitted his son and heir apparent, at the time of the marriage of the son, to endow his wife at the church door, of a portion thereof. This species of dower resembled dower *ad ostium ecclesiæ*, and, as was the rule in that mode of endowment, no further assignment was necessary.[1] The widow might enter upon the dower thus assigned her, immediately upon the death of her husband, even though the father were still living.[2] It is said, however, and with apparent reason, that it was important to the widow that she should have a deed from the father showing his consent to the endowment.[3]

29. Dower *de la pluis beale* was where the husband held a portion of his lands by knight service and a portion in socage, and died leaving a widow and a son within the age of fourteen years, and the lord of whom the land was held in knight's service entered upon that portion as guardian in chivalry during the nonage of the infant, and the widow entered upon and occupied the residue as guardian in socage. If, in such case, she brought a writ to be endowed of the whole premises, she was compelled to endow herself *de la pluis beale;* that is to say, of the fairest portion of the tenements held by her as guardian in socage.[4]

30. Dower by the common law is the only one of these several kinds of dower that prevails in the United States. The first, fourth, and fifth were long since abolished in England, the fifth, particularly, sharing the fate of the military tenures of which it was an appendage.[5]

31. While, as we have seen, some writers, including Lord Coke, confidently assert that dower in lands formed one of the institutions of the Saxons, there are others who, on the contrary, maintain that it was not known in England until after the Norman Conquest. Chancellor Kent appears to be of this number.[6] Sir Martin Wright supposes it to have been brought to England by the Normans as a branch of their doctrine of fiefs or tenures.[7] Spelman deduces the word *dos* from the French *douaire*.[8] And in Bacon's Abridgment

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[1] Litt. § 40. See Glanville, b. 6, ch. 17.

[2] Co. Litt. 35, b. In the time of Glanville this was an unsettled question; b. 6, ch. 17.

[3] Litt. § 40. See Crabb's Hist. Eng. Law, 80, 81.

[4] Litt. § 48.

[5] Thomson's Charters, 173; Lambert on Dower, 14. Dower *ad ostium ecclesiæ*, and *ex assensu patris* are abolished by 3 and 4 Will. IV. c. 105, § 13. See Appendix.

[6] 4 Com. 36, note a. See ante, § 5.

[7] Wright on Tenures, 192; 4 Kent, 36, note; Stearns' Real Act, (274,) 2d ed.

[8] Spelm. tit. *Doarium*, 175.

it is said, that among the feudists the rule was *non uxor marito, sed uxori maritus affert*, and the reason given is that the husband and eldest son of the family being brought up in military exercise, the wife and youngest sons tilled and improved the land, and in the expeditions of the former, the latter found provisions for the army, and having the third part in labor, the wife had the third part of the feud for the maintenance of herself and the younger children during her life.[1]

32. But whatever question there may be as to the nation or people with whom this institution originated, no doubt can exist as to the motive which led to its adoption into the common law of England. It is a provision intended for the sustenance of the wife and younger children at a time when the husband and father can no longer minister to their wants.[2] The dependent condition of the widow, and the helplessness of the orphan have ever been proverbial, and many centuries ago it was written of them that they should be constantly held in remembrance by the Great Father of all. A feeling of tenderness and pity for their forlorn and destitute condition is a common sentiment with mankind, and the instincts of humanity have declared that a fund sacred to that purpose alone should be set apart for their maintenance and support. "The relation of husband and wife," says Sir Joseph Jekyll, "as it is the nearest, so it is the earliest; and therefore the wife is the proper object of the kindness and care of the husband. The husband is bound by the law of God and man to provide for her during his life; and after his death the moral obligation is not an end; but he ought to take care of her provision during her own life. This is the more reasonable, as during the coverture, the wife can acquire no property of her own. If, before her marriage she had a real estate, this, by the coverture, ceases to be hers. Her personal property becomes his absolutely, or at least is subject to his control; so that, unless she has a real estate of her own, (which is the case of but few,) she may, by his death, be destitute of the necessaries of life, unless provided for out of his estate, either by a jointure or by dower. As to the husband's personal estate, unless restrained by special custom, which very rarely takes place, he may give it all away from her, so that his real estate, if he

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[1] 2 Bac. Abr. 356, note, citing Spelman, tit. *Doarium*, 175.

[2] The real objects of dower are sustenance for the wife, and nurture and education for the children. Fleta, L. 5, cap. 23.

has any, is the only plank she can lay hold of to prevent her sinking under her distress. Thus the wife is said to have a moral right to dower."[1]

33. In the earlier ages it was considered of paramount importance to guard and protect the dower interest of the widow; for by the old law lands could not be devised, unless it were in some particular places, by the custom, until the statute of Henry VIII. And in those early days the personal estates of the wealthiest were inconsiderable, and before trusts were invented, which was at a comparatively recent period, the husband could give his wife nothing during his own life.[2] Hence, without her dower, the widow, in most instances, would have been left without any provision whatever. Hence, too, we find the sturdy and chivalrous barons of more than six centuries ago, incorporating into the Great Charter of their liberties a provision intended to endure for all time, securing to the widow her right of dower. It would seem also that the Church, ever vigilant and active, untiringly exerted its commanding influence to establish upon a firm foundation this all-important right. "The provision for the widow," says Mr. Maine, "was attributable to the exertions of the Church, which never relaxed its solicitude for the interest of wives surviving their husbands—winning, perhaps, one of the most arduous of its triumphs, when, after exacting for two or three centuries an express promise from the husband at marriage to endow his wife, it at length succeeded in engrafting the principle of dower on the customary law of all Western Europe. Curiously enough, the dower of lands proved a more stable institution than the analogous and more ancient reservation of certain shares of the personal property to the widow and children."[3] According to Lord Bacon, "the tenant in dower is so much favored as that it is the common by-word in the law that the law favoreth three things: 1. Life; 2. Liberty; 3. Dower."[4] *Favorabilia in lege sunt, vita, fiscus, dos, libertas*, was indeed a maxim of the law, and the Year Books and early reports contain ample proofs of the liberal spirit manifested by the courts in its application.[5]

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[1] 2 P. Wms. 702, in Banks *v.* Sutton.

[2] 1 Inst. by Harg. & B. 13 ed. 30, b. note 8; 1 Thomas' Coke, 442, (*567,) 30, b. note.

[3] Maine's Anc. Law, 224.

[4] Bacon's Reading on the Stat. of Uses, ed. 1642, pp. 31, 32.

[5] Park, Dower, 2; Cro. Car. 301; Cro. Jac. 111; 9 Co. 17, b.; 8 Atk. 37; 1 Dall. Rep. 417.

34. It must be admitted, however, that some of the causes which led to this extreme jealousy of the law, and watchful care of the courts on behalf of the dowress, have, in a measure, disappeared. The rigor of the ancient common law has been greatly softened. The right of separate property in the wife is now liberally accorded her; and the same humane and chivalrous spirit which first led to the establishment of the estate in dower has, in the progress of time, and with beneficent hand, sundered many of the fetters with which her property interests were formerly bound. In some of the American States the right of dower has been greatly extended. In others, in default of issue, and where the husband dies intestate, she succeeds to the entire estate remaining after payment of his debts. Possibly there is a tendency in modern legislation to proceed to the opposite extreme; for while, at all times, ample provision should be made for the widow, it should not be forgotten that there may be others beside lineal descendants, who, by the ties of blood, and the laws of nature, have likewise claims upon the estate of the deceased.

CHAPTER II.

DOWER IN THE UNITED STATES.

§ 1. Introductory.
2–5. Dower in Virginia.
6–7. Massachusetts.
8. Connecticut.
9. New Jersey.
10. New York.
11, 12. Delaware.
13, 14. South Carolina.
15. North Carolina.
16. Tennessee.
17. Georgia.
18. Mississippi.
19. Alabama.
20. Rhode Island.
21. Maryland.
22. Vermont.
23. Kentucky.
24. New Hampshire.
§ 25. Dower in Pennsylvania.
26. Ohio.
27, 28. Indiana.
29. Illinois.
30. Michigan.
31. Missouri.
32. Arkansas.
33. Maine.
34. Florida.
35. Wisconsin.
36. Iowa.
37. Minnesota.
38. Oregon.
39. Kansas.
40. Texas.
41. California.
42. Louisiana.

1. A BRIEF account of the introduction of dower, and its early history in this country, seems a proper accompaniment to the preceding chapter, and may prove not altogether without profit to the practitioner, nor entirely devoid of interest to the student of the law.

2. *Virginia.*—The first charter to Sir Thomas Gates and others, for the settlement of Virginia, bears date April 10, 1606, and was granted by James I. in the fourth year of his reign.[1] By that instrument it is declared that the colonists and their descendants "shall have and enjoy all liberties, franchises, and immunities within any of our other dominions, to all intents and purposes as if they had been abiding and born within this our realm of England, or any other of our said dominions."[2] Among the "Articles, Instructions, and Orders, made sett down and established" by the king "for the good order and government of the two several colonies and plantations to

[1] Stith's App. No. 1, p. 1.

[2] Sec. 15; 1 Hen. Stat. at Large, p. 64.

be made by our loving subjects in the country called Virginia," is the following: "And moreover wee do hereby ordaine and establish for us, our heirs and successors, that all the lands, tenements, and hereditaments, to be had and enjoyed by any of our subjects within the precincts aforesaid, shal be had and inherited and injoyed according as in the like estates they be had and enjoyed by the lawes within this realme of England."[1] It was in December, 1606, that the adventurers who were to find a new home beyond the Atlantic, Captain John Smith among the number, set sail from England for Virginia, and late in the following season landed upon the banks of the James River, selected a site for the colony, and proceeded to take measures for the establishment of the infant commonwealth. At that time there were but two settlements of whites along the whole extent of our shores, that of the Spaniards at St. Augustine, away in the extreme southwest, and a small colony of the French, who had landed at Port Royal some two years before. The remainder of the continent was a wide-spread wilderness.

3. It was but natural that the colonists should bring with them many of the laws and customs of the mother country. It needed not "Articles and Instructions" from the king to secure this result; and it would have been difficult for him, even by an arbitrary exercise of the powers reserved in the charter, if he had been so disposed, to entirely defeat the wishes and inclinations of the colonists in this respect. As their ancestors, upon the banks of the Runingmede, had not been unmindful of the widow and the orphan, so we find, among the ancient records of the colony, unmistakable evidence that the same thoughtful regard and provident care for the dependence of the one, and the helplessness of the other, were manifested by the men who had taken up their abode in the forest, upon the banks of the James River, three thousand miles from the land of their birth. But a little more than twenty years from the time the vessels of the emigrants first sailed along the James River—some fourteen years only after the gentle Pocahontas exchanged marriage vows with John Rolfe, and about seven years from the time the Pilgrim Fathers landed at Plymouth Rock—the right of a widow to dower in the lands of her deceased husband was distinctly recognized, in the exercise of their judicial functions, by the "Governor and Council

[1] Nov. 20, 1606; MS. record book in the Register's Office, Va., Book No. 2, p. 1; 1 Hen. Stat. at Large, 67, 69.

of Virginia." The following entry, taken from some loose manuscript sheets found among the acts of the General Assembly of the period to which they relate, will verify the truth of this observation:

A court at James citty the 16th Nov, 1627. Capt. ffrancis West, Esq. Governor, &c. Doct. Pott, Mr. Persey, Capt. Smith, Mr. Secretary, Capt. Matthewes, Capt. Tucker, Mr. ffarrar.

At this court the lady Temperance Yeardley came and did fully and absolutely confirm, as much as in her lay, the conveyance made by her late husband, Sir George Yeardley, knt. late Governor, deceased, unto Abraham Persey, Esq., for the lands of Flowerdieu Hundred, being one thousand acres, and of Weandoke on the opposite side of the water, being 2200 acres. And the said lady Temperance Yeardley did then altogether absolutely disclaime and release unto the said Abraham Persey, all her right, interest and claime, in all and every part of the said lands, to herself anyways being and appertaining, either by way of dower or thirds.[1]

The next notice of the right of dower we have is the following, from which it appears that it was not always restricted to one-third of the husband's estate:—

Streeter *v.* Burbage's heir.

In the difference between Capt. Streeter who married Mrs. Burbage, the relict of Capt. Thomas Burbage, It is ordered, That the plantation of the said Burbage att Nansemund be equally devided in quantity and quality both land and houseing, and all other lands of the said Burbage be divided according to quantity and quality as aforesaid, into thirds by a jury upon the place; of both which, being soe devided, the said Streeter's wife is to chuse which half of the plantation att Nanzemund, and which thirds of the other land she pleaseth to enjoy; the same only for her life; and Wm. Burbage to take the remainder as heir at lawe, the charges of those divisions to be bearen according to each others proportions.[2]

4. Although, as above shown, the right of dower appears to have been recognized by the judicial authorities, there was no express enactment on the subject until the meeting of the "Grand Assembly at James City," in September, 1664, at which time the following law was passed:—

Act VII. *An act concerning Widdows thirds.*

Whereas some doubts have risen about the proportioning and assigning the thirds of the estates of persons intestate to their widdows, It is, for explanation, enacted by this grand assembly and the authority thereof, that the estate of all persons intestate, or where the will is doubtfull, whether personall or reall, vizt., land cleered, or wood land, and houseing, may be, according to the quantity

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[1] 1 Hen. Stat. at Large, 145, note.

[2] Public orders of Assembly, March 24th, 1655; 1 Hen. Stat. at Large, 405.

and quality of the said land and houseing, divided equally into thirds, and the widdow to have her choice after the division.[1]

Thus stood the law in Virginia until 1673. Subsequently, "att a Grand Assembly holden at James city," on the 20th of October, 1673, "to the glory of Almighty God, and publique Weale of this, his Majestie's Colony of Virginia, were enacted as followeth:"—

Act I. *An act for establishing the dowers of Widdows.*

Whereas, many doubts have arisen concerning the estates of persons dying intestate, and of what parte thereof ought to appertaine to the widdow; for the clearing whereof, Be it enacted by the governor, councell and burgesses of the grand assembly, and the authority thereof, that where persons dye intestate, the widdow shal be endowed with the third part of the real estate to bee equally divided as to houseing, ffenced grounds, orchards, woods, and other valuable conveniences, dureing her naturall life, and the third part of the personal estate, if there be but one or two children, but if there be any number of children more, how many soever, in that case the personall estate to be devided amongst the widdow and all the children, share and share alike; and in case the husband make a will, that he hath it in his power to devise more to his wife than what is above determined, but not lesse.[2]

5. An act passed at the session of October, 1705, provided that the widow of an intestate should be endowed of one full equal third part of the lands of her deceased husband "in manner as is directed and prescribed by the laws and constitutions of the kingdom of England." It also gave her the right to continue in the mansion house of her husband, and the messuage thereto belonging, free of charge, until her dower was assigned. But in case a jointure was settled upon her in the lifetime of her husband, such "as by law doth barr her of her dower," she was restricted thereto.[3] This statute was substantially re-enacted at the session of 1748.[4] At the sessions of October, 1705, and February, 1727, acts were passed relating to dower in slaves, and the remedy of the widow in such cases.[5] A similar statute was passed in 1748.[6] Chapter I. of the acts of the same session directs the mode of relinquishment of dower by femes covert.[7] The subsequent legislation, commencing with the session of October, 1785, in which dower in equitable estates was first provided for, will be noticed, under appropriate heads, in the ensuing pages.

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[1] 2 Hen. Stat. at Large, 212.
[2] 2 Hen. Stat. at Large, 303.
[3] 3 Hen. Stat. at Large, 374, §§ 8, 9.
[4] 5 Hen. Stat. at Large, 448, §§ 14, 15.
[5] 3 Hen. Stat. at Large, 334, 335, §§ 9, 10, 11; 4 Hen. Stat. at Large, 227, § 18.
[6] 5 Hen. Stat. at Large, 445, 446, §§ 5–8.
[7] 5 Hen. Stat. at Large, 410, 411, §§ 5–8.

6. *Massachusetts.*—The earliest law in Massachusetts, conferring the right of dower, is the colony act of 1641,[1] which reads as follows:—

Forasmuch as no provision hath been made for any certain maintenance of wives after the decease of their husbands;

It is ordered by this court, and the authority thereof, that every married woman, (living with her husband in this jurisdiction, or other where absent from him with his consent, or through his mere default, or inevitable providence, or in case of divorce where she is the innocent party,) that shall not, before marriage, be estated by way of jointure, in some houses, lands, tenements, or other hereditaments for term of life, shall, immediately after the death of her husband, have right and interest, by way of dowry, in and to one third part of all such houses, lands, tenements, and hereditaments, as her husband was seized of to his own use, either in possession, reversion or remainder, in any estate of inheritance, (or frank tenement not then determined,) at any time during the marriage, to have and enjoy for the term of her natural life, according to the estate of such husband, free and fully discharged of and from all titles, debts, rents, charges, judgments, executions, and other incumbrances whatsoever, had, made or suffered by her husband during the said marriage between them, or by any other person claiming by, from, or under him, or otherwise than by some act or consent of such wife, signified by writing under her hand, and acknowledged before some magistrate, or others, authorized thereunto, which shall bar her from any right or interest in such estate. And if the heir of the husband, or other person interested, shall not, within one month after lawful demand made, assign and set out to such widow her just third part with conveniency, or to her satisfaction, according to the intent of this law, then upon a writ of dowry in the court of that shire where the said houses, lands, tenements, or other hereditaments shall lie, or in the court of assistants, if the same lie in several shires, her third part or dowry shall be assigned her, to be set out in several by metes and bounds, by such persons as the same court shall appoint for that purpose, with all costs and damages sustained; provided, always, this law shall not extend to any houses, lands, tenements or other hereditaments sold or conveyed away by any husband, bona fide, for valuable consideration before the last of November, one thousand six hundred and forty-seven. Provided, also, that every such widow so endowed as aforesaid, shall not commit or suffer any strip or waste, but shall maintain all such houses, fences and inclosures as shall be assigned to her for her dowry, and shall leave the same in good and sufficient reparation in all respects.[2]

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[1] 1 Washb. Real Prop. 149, note; 4 Dane's Abr. 664; Stearns' Real Act, 279. "An Abstract of the Lawes of New England," as they were then established, was published in London in 1641, but prior to the adoption of the act above given. Chapter IV. of the laws thus published regulates the right of descent, but is silent as to any provision for the widow. 8 Force's Hist. Tracts, No. IX. p. 8.

It may be remarked in this connection that the Massachusetts colony act of 1641 appears to be the first legislative enactment, on the subject of dower, on this side the Atlantic, the Virginia statute of 1664 being the next in order.

[2] Anc. Laws and Char. Mass. Bay, 99.

By the terms of the proviso in this act, excepting from its operation lands sold or conveyed by the husband prior to November, 1647, it would seem that anterior to that date the right of dower was not very securely established, otherwise it would have prevailed against a purchaser from the husband alone, notwithstanding the language of the proviso.

7. The Province Law of 1696, which directed the mode of distribution of insolvent estates among creditors, contained a clause securing the right of dower.[1] In 1701 was passed "an act for the speedy and convenient assignment of dower," resembling, in its general features, the statute now in force.[2] A law of 1783 gave to the widow the right to waive the provisions of her husband's will in her favor, and take dower in his estate.[3] Another law of the same year declares "that the widow of the deceased shall, in all cases, be entitled to her dower in the real estate, (where she shall not have been otherwise endowed before marriage,) and to a recovery of the same in manner as the law directs."[4] The right of dower was also protected in equities of redemption taken on attachment or execution against the husband,[5] and also in estates confiscated under the act of 1779;[6] and no deed or mortgage of the husband was to bar the wife's dower unless she joined therein.[7] In the act regulating descents was a clause securing to the "widow her dower at the common law, unless she be lawfully barred of the same."[8] The foregoing comprehend the material provisions of the laws of Massachusetts respecting dower, down to the revision of 1836.

8. *Connecticut.*—In the revision of the statutes of Connecticut made in 1672, many of the material portions of the Massachusetts colony act of 1641[9] were adopted, with one important variation. By the act last mentioned the wife was dowable of all lands of which the

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[1] Anc. Laws and Char. Mass. Bay, 290; incorporated in act of 1784, ch. 2; 1 Laws Mass. 152.

[2] Ibid. p. 359–362; see, also, Acts 1783, ch. 40; 1 Mass. Laws, p. 119.

[3] 1 Laws of Mass. p. 94, ch. 24, § 8; Acts of 1783.

[4] 1 Laws of Mass. p. 106, ch. 36, § 4; Laws of 1783.

[5] 1 Laws of Mass. 142, ch. 57, § 4; Laws of 1783.

[6] 1 Laws of Mass. 51, ch. 50, § 2; Acts of 1780.

[7] 1 Laws Mass. 111, ch. 37, § 5; Acts of 1783.

[8] 2 Laws Mass. 146, ch. 90, § 1; Acts of 1805.

[9] Stat. Conn. (1796,) p. 146, § 1; Stat. Conn. (1808,) p. 239, and note; Stat. Conn. (1821,) p. 180, and note; Stat. Conn. (1838,) p. 188; Rev. Stat. 1849, p. 276; Comp. Stat. 1854, p. 382.

husband was seized during the coverture. By the statute as adopted in Connecticut the right of dower was restricted to the estate of which the husband was seized at the time of his death. The first section reads as follows:—

> Every married woman living with her husband in this State, or absent elsewhere from him with his consent, or through his meer Default, or by inevitable Providence; or in case of Divorce where she is the innocent party, that shall not, before marriage, be estated by way of jointure in some Houses, Lands, Tenements, or Hereditaments for Term of life; or with some other estate in lieu thereof, shall immediately upon and after the death of her husband, have right, title, and interest, by way of dower, in and unto one third part of the real estate of her said deceased husband, in houses and lands which he stood possessed of in his own right at the time of his decease, to be to her during her natural life; the remainder of the estate shall be disposed of according to the will of the deceased; and when there is no will according to law.[1]

The same act, as subsequently revised, provided a mode for the speedy assignment of dower; forbid waste, and declared the remedy in such cases.[2] In 1699 the Massachusetts act of 1692, providing for the distribution of intestate estates, was adopted.[3] This act contained a saving of the widow's "dower or thirds in the houses and lands during her life," where she had not been otherwise endowed before marriage.[4] Dower was also protected in insolvent estates.[5] In 1794 an amendment was made conferring upon judges of probate power to order the assignment of dower.[6] The material provisions of these enactments are still in force.[7]

9. *New Jersey.*—In East Jersey, in 1682, it was provided that the estate of a feme covert might be conveyed by deed acknowledged in the Court of Common Right, the wife declaring upon such examination that she signed it freely, without threats or compulsion of her husband. By a subsequent act this acknowledgment might be

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[1] Stat. Conn. (1796,) p. 146, § 1; Stat. Conn. (1808,) p. 239, and note; Stat. Conn. (1821,) p. 180, and note; Stat. Conn. (1838,) p. 188; Rev. Stat. 1849, p. 276; Comp. Stat. 1854, p. 382.

[2] §§ 2, 3, 4. The 2d section was passed in Oct. 1786; the 3d section was in the original revision of 1672; the 4th section was introduced in the revision of 1702. Stat. Conn. (1808,) p. 240, notes.

[3] Stat. Conn. (1808,) 265, and note, p. 266.

[4] Ibid. § 12; see p. 267, § 16, and note 18.

[5] Stat. Conn. (1808,) pp. 275–6.

[6] Stat. Conn. (1796,) p. 148; Stat. Conn. (1808,) p. 240.

[7] See Comp. Stat. 1854, p. 382, ch. 3; p. 498, § 40; p. 499; p. 504, § 59.

made before a judge of any court of record in the Province.[1] An amendatory act relating to descents, passed May 24, 1780, contained a saving clause that none of the provisions thereof should affect marriage settlements, jointures, nor the widow's "right of dower."[2] In 1795 the widow was authorized to bequeath crops growing on the lands assigned her in dower;[3] and a year later it was enacted that her right should not be barred by the conviction of the husband of any crime or offence against the State.[4] "An act relative to dower" was passed January 31, 1799, the first section of which is as follows:

> The widow, whether alien or not, of any person dying intestate, or otherwise, shall be endowed for the term of her natural life, of the one full and equal third part of all the lands, tenements, and other real estate whereof her husband, or any other to his use, was seized of an estate of inheritance at any time during the coverture, to which she shall not have relinquished or released her right of dower by deed executed and acknowledged in the manner prescribed by law for that purpose.[5]

The widow was to remain in the mansion house of her husband until her dower was assigned;[6] a remedy was given her in case she was deforced of her dower, or it was unfairly assigned her, or was not assigned within forty days from the death of her husband;[7] judgment against the husband by default, or a collusive recovery against him, was not to impair her right;[8] provision was also made for the admeasurement and assignment of dower.[9] Many of the material provisions of this statute are still in force in New Jersey.[10]

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[1] Fields' Prov. Courts of N. J. 206, citing "Grants and Concessions," pp. 235, 371. The same writer says: "Our fathers brought with them the common law. . . . . It was their birthright—their inheritance; and they transplanted it, along with themselves to this congenial soil, where it at once took root, and flourished. Its ample folds covered all the nakedness of our provincial enactments. Its abundant resources supplied all their deficiency." Ibid. pp. 15, 16. The act of Decr. 2, 1748, also declares "how the estate or right of a feme covert may be conveyed or extinguished." Acts of General Assembly, by Allison, p. 132.

[2] Laws of N. J. by Paterson, pp. 43, 44, § 4; see, also, Act of 1817, Laws of N. J. by Justice, p. 610, § 7; Stat. N. J. (1847,) 840.

[3] Laws of N. J. by Paterson, 192.

[4] Act of 1796, § 75; Laws of N. J. by Paterson, p. 221; Laws of N. J. by Justice, 263; Stat. N. J. (1847,) 284.

[5] Laws of N. J. by Paterson, p. 343; Laws of N. J. by Justice, 397; Stat. of N. J, (1847,) p. 71, ch. 4; Nixon's Dig. p. 209.

[6] Paterson, p. 343, § 2.

[7] Paterson, 343, § 3.

[8] Ibid. § 5.

[9] Nixon's Dig. 209, "Dower."

[10] Ibid.

10. *New York.*—The first Colonial Assembly of New York met in 1683. The acts of this body are not found in any edition of the statutes extant, and but few of them have been preserved. Among the number rescued from oblivion, however, is "The Charter of Libertys and Privileges granted by his Royal Highness to the Inhabitants of New York, and its Dependencies," passed October 30, 1683. The following are among the provisions contained in this enactment:—

Thatt no Estate of a ffeme covert shall be sold or conveyed butt by deed acknowledged by her in some Court of Record, the woman being secretly examined, if shee doeth itt freely without threats or compulsion of her husband.

Thatt a Widdow, after the death of her husband, shall have her dower, and shall, and may tarry in the chiefe house of her husband forty days after the death of her husband, within which forty days her dower shall bee assigned her, and for her dower shall bee assigned unto her the third part of all the lands of her husband during coverture, except shee were endowed of lesse before marriage.[1]

The foregoing provision relating to a separate examination and acknowledgment by the wife, was re-enacted in identically the same language in the statute of May 6, 1691.[2] In January, 1787, an act was passed regulating the right of dower, the first section of which is as follows:—

That a widow after the death of her husband shall give nothing for her dower, or her inheritance, which her husband and she held at the day of the death of her husband; and she shall tarry in the chief house of her husband forty days after the death of her husband, or until her dower be assigned to her; and she shall have in the meantime her reasonable sustenance out of the estate of her husband; and for her dower shall be assigned unto her the third part of all the lands of her husband, which were his at any time during the coverture.[3]

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[1] Laws of N. Y. (1813,) by Van Ness and Woodworth, vol. ii. Appendix, No. II. p. 5. "It is worthy of remark, that the Crown, in 1697, repealed a law very similar in its provisions to the preceding charter, &c. entitled 'An act declaring what are the rights and priviledges of their Majestyes subjects inhabiting within their province of New Yorke.' This act may be seen at large in Bradford's edition, pages 1, 2, 3, 4, &c. and was passed in 1691. Vide, also, Smith's History of New York, 76, in notes. It is presumed that the foregoing 'Charter of Libertys' shared the same fate, though no record has yet been met with, to ascertain the fact." Ibid. p. 6, note.

[2] 3 Rev. Stat. N. Y. App. No. I. p. 3; Bradford, p. 5. See, also, the preceding note. The act of 1691, however, contained no provision defining the right of dower.

[3] Act of Jany. 26, 1787; Laws of N. Y. (1813) by Van Ness and Woodworth, vol. i. p. 56, § 1. The act of Feby. 23, 1786, to abolish entails, and regulate descents, contained a saving of dower; 1 Jones & Varick, p. 247, § 4.

The statute of 20 Hen. III. ch. 1, providing for the recovery of damages in case of deforcement of dower; the 3 Edw. I. ch. 49, relating to the abatement of the writ of dower *unde nihil habet;* the statutes of Westminster, 2, and 13 Edw. I. ch. 4, guarding the widow against judgments by default, or collusive recoveries suffered by the husband; the 3 Edw. I. ch. 48, and 13 Edw. I. ch. 4, protecting the infant heir against collusive recoveries of dower, and prescribing the form of a writ to recover dower lost by the widow by default; the 13 Edw. I. ch. 7, authorizing a guardian to take out a writ of admeasurement of dower; the statute of Westminster, 2, and 13 Edw. I. ch. 34, withholding dower from an adulteress; the statute of 27 Hen. VIII. ch. 10, § 6, relating to jointures; the 1 Edw. VI. ch. 12, § 17, giving dower notwithstanding the attainder, conviction, or outlawry of the husband, were also substantially incorporated with the same act. A statute, supplementary to the act of 1787, was passed April 7, 1806, relating principally to the mode of assigning dower, and directing in what courts proceedings therefor should be had.[1]

11. *Delaware.*—In the 35 of Charles II. (1683,) a law was passed with the following title: "How the estate of any person shall be disposed of at his death." It directed

That whatsoever estate any person hath in this province, or territories thereof, at the time of his death, unless it appear that an equal provision be made elsewhere, shall be thus disposed of: That is to say, one third to the wife of the party deceased, one third to the children equally, and the other third as he pleaseth; and in case his wife be deceased before him, two thirds shall go to the

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[1] Laws of New York, (1818,) by Van Ness and Woodworth, vol. ii. p. 60. A statute of New York, passed March 20, 1860, contained the following provisions:—

"§ 10. At the decease of husband or wife, leaving no minor child or children, the survivor shall hold, possess, and enjoy a life estate in one third of all the real estate of which the husband or wife died seized.

"§ 11. At the decease of the husband or wife intestate, leaving minor child or children, the survivor shall hold, possess, and enjoy all the real estate of which the husband or wife died seized, and all the rents, issues, and profits thereof, during the minority of the youngest child, and one third thereof during his or her natural life." Laws of N. Y. 83 sess. ch. 90, p. 159. This law did not, in terms, expressly repeal the dower act contained in the Revised Statutes, and while it was in force it was an unsettled question whether the interest in the husband's property thereby given to the widow, was intended to be in lieu of, or in addition to her dower. The sections above quoted, however, were repealed in 1862. Act of April 10, 1862; Laws of N. Y. 85 sess. p. 344, § 2.

children equally, and the other third to be disposed of as he shall think fit, his debts being first paid.[1]

By a subsequent section it was provided that one-third the personal estate of an intestate should go to his wife:—

And further, one third of his lands and tenements to his wife during her natural life; the remainder, together with the other two thirds, to his children.[2]

If there were no child, the widow was to have a moiety of the real estate for life.

12. In 1693 (5 Will. and Mary) was passed "the law about testates and intestates estates." It directed that all real and personal estates held by any person at the time of his death should be sold for the payment of debts, and such sale was declared to be "conclusive against such deceaseds and their heirs, and all claiming under them." If the personal estate was sufficient to discharge the debts and expenses of administration, then the real estate of *testators* was to go as devised by them, "and one third part of all *intestates* lands and tenements to the wife for her life;" the residue to the heirs.[3] Under this law the right of dower was not only made subordinate to the claims of creditors, but subject, also, to the husband's power of disposition by will. This was remedied in 1697, when, in an act similar in most respects to that of 1693, a limitation was placed upon this power of the husband, and it was required "that no less than one third part of the said real estate be allowed and invested in the widow during her natural life, except where due and equivalent provision hath been made before by the testator."[4] The act of 1721 provided, in like manner, for the sale of estates real and personal for the payment of debts, and the maintenance and education of the children, saving, however, dower in lands of which a husband died seized and intestate, and excepting from its operation lands conveyed by way of marriage settlement.[5] By an act of 1766, no will made by the husband prior to the marriage was to affect the right of dower, but as to the wife of such marriage the testator was to be regarded as dying intestate, and she was to take the same share of his estate

[1] Laws of Del. vol. i. Appendix, p. 16, § 109.

[2] Ibid. § 172. The eldest son was to have a double share.

[3] Laws of Del. vol. i. App. p. 20, § 14.

[4] Ibid. p. 24, § 4; again in 1700, Ibid. p. 26, chap. 6, a., § 31; substantially re-enacted in 1706; Ibid. p. 50, chap. XV. a.

[5] Laws of Del. vol. i. p. 55, ch. XXXI. a.; substantially re-enacted in 1742; Ibid. p. 62, ch. CI. a.

as if "no such will had ever been made."[1] For nearly or quite a century and a half the people of Delaware adhered to the policy of making the claims of creditors paramount to dower. It was not until 1816 that the law was so changed as to conform to the principles of the common law in this respect.[2]

13. *South Carolina.*—For several years after the first settlement of the country, North and South Carolina were united under the same government as the "province of Carolina." As early as 1671, however, there was a division of the territory of the province, and what is now South Carolina was set off as the "County of Carteret in Carolina;" but it was not until 1715 that it had a separate legislature. Prior to the year 1698 there appears to be no reference, in the legislation of the province, to the right of dower. In October of that year, however, an act was passed "to prevent deceits by double mortgages, and conveyances of Land Negroes and Chattels," which contained the following provision:—

> Provided, also, that nothing in this act contained, shall be construed, deemed or extended, to bar any widow of any mortgage[3] of any lands or tenements from her dowry and right in or to the said lands who did not legally join with her said husband in such mortgage, or otherwise bar or exclude herself from such her dowry or right.[4]

Although there was then no statute expressly giving dower, this law contains an unequivocal recognition of its existence as an acknowledged and established right.

14. In 1712 was passed "an act to put in force in this province the several statutes of the kingdom of England, or South Britain, therein particularly mentioned," by virtue of which many of the English laws became operative in South Carolina. In this enactment was embraced a considerable portion of *Magna Carta* of 9 Henry III., but for some reason the chapter relating to dower was omitted. In addition to the statutes, and parts of statutes adopted by particular and specific reference thereto, a general clause was incorporated in the law, by which it was declared that every part of the common law of England, not altered by acts adopted, nor inconsistent with the particular constitutions, customs and laws of the

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[1] Laws of Del. vol. i. p. 419.

[2] Act of 1816, § 2; Laws of Del. (Rev. 1829,) p. 167.

[3] So in the printed text; it should be "mortgagor."

[4] Stat. S. C. vol. ii. p. 137.

province, except so much as related to the ancient tenures abrogated by the act of parliament of 12 Charles II., was likewise adopted.[1] Under this comprehensive provision, it would seem that the entire body of the English common law of dower, as then existing, became a part of the law of South Carolina. In the same year was re-enacted the law of 13 Edward I., chap. 34, relating to the forfeiture of dower by the adultery of the wife.[2] Also that portion of the 27 Henry VIII., chap. 10, which relates to jointures, giving the widow the right of election where a jointure was settled upon her after marriage, and providing a remedy in case of her eviction therefrom.[3] An act of 1731 also recognizes dower, and provides a mode for its relinquishment.[4] And in the statute relating to wills the widow is authorized to bequeath the crops growing upon the lands held by her in dower.[5] In 1777 an act for the admeasurement of dower, and directing the mode of procedure, in such cases, was adopted;[6] it was repealed in 1786, and a new statute substituted in its stead.[7] An act of 1799 declared that it should not be necessary first to petition for a writ of dower, but that the writ should issue as a matter of right.[8]

15. *North Carolina.*—In 1715 the South Carolina act of 1698[9] was substantially re-enacted in North Carolina.[10] In the same year "an act for preventing disputes concerning lands already surveyed" was passed, the sixth section of which is as follows:—

> All surveys or patents hereafter to be made or granted for the land or plantation of any deceased person, the same shall be made and granted in the name of the heir at law, which, nevertheless shall not bar any that have title thereto by dower or courtesy, or by the will of the deceased possessor; but that every title or claim shall stand good and valid in law, as they might or ought to have done if the deceased possessor had, in his lifetime, surveyed and taken out a patent for the same in his own name.[11]

An act of 1779 saves dower in confiscated lands.[12] But the princi-

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[1] Stat. of S. C. vol. ii. pp. 401, 413; see, also, vol. i. p. 73.
[2] Stat. of S. C. vol. ii. p. 422.
[3] Stat. of S. C. vol. ii. pp. 468, 469, §§ 6–9; 1 Brev. Dig. 268, 269.
[4] Stat. S. C. vol. iii. p. 302, § 29; 1 Brev. Dig. p. 270, § 5; re-enacted in 1778; Ibid. p. 270, § 6.
[5] Stat. S. C. vol. iii. p. 383, § 4.
[6] Stat. S. C. vol. iv. p. 385.
[7] Stat. S. C. vol. iv. p. 742; 1 Brev. Dig. pp. 270, 271, §§ 7–10.
[8] Stat. S. C. vol. vii. p. 294; 1 Brev. Dig. p. 271, § 11.
[9] Ante, § 13.
[10] 1 Laws N. C. p. 104, ch. 7.
[11] 1 Laws N. C. p. 101, ch. 4, § 6.
[12] 1 Laws N. C. p. 391, ch. 153.

pal dower act of North Carolina was passed in 1784, and is as follows:—

And whereas, the dower allotted by law in lands for widows, in the present unimproved state of the country, is a very inadequate provision for the support of such widows, and it is highly just and reasonable that those who by their prudence, economy and industry have contributed to raise up an estate to their husbands, should be entitled to share in it; Be it therefore enacted by the authority aforesaid, That if any person shall die intestate, or shall make his last will and testament, and not therein make any express provision for his wife, by giving and devising unto her such part or parcel of his real or personal estate, or to some other for her use, as shall be fully satisfactory to her, such widow may signify her dissent thereto before the judges of the Superior Court, or of the court of the county wherein she resides, in open court, within six months after the probate of said will; and then and in that case she shall be entitled to dower in the following manner, to-wit: one third part of all the lands and tenements and hereditaments of which her husband died seized or possessed. Provided always, That any conveyances made fraudulently to children, or otherwise, with an intention to defeat the widow of the dower hereby allotted, shall be held and deemed to be void, and such widow shall be entitled to dower in such land so fraudulently conveyed, as if no conveyance had been made, which said third part shall be and enure to her own proper use, benefit and behalf, for and during the term of her natural life; in which said third part shall be comprehended the dwelling house in which the said husband shall have been accustomed to dwell next before his death, and commonly called the mansion house, together with the offices, outhouses, buildings and other improvements thereto belonging or appertaining. Provided, That in case it should appear to the said judges or justices, that the whole of the said dwelling house, outhouses, offices, and appurtenances, cannot be applied to the use of the wife without manifest injustice to the children or other relations, then, and in that case such widow shall be entitled to such part or portions of said dwelling house, outhouses and improvements thereunto belonging, as they shall conceive will be sufficient to afford her a decent residence, due regard being had to her rank, condition, and past manner of life; which dwelling house, outhouses, offices and improvements, or such part thereof so allowed the said widow, shall be and enure to her during the term of her natural life; and furthermore, if such husband shall die leaving no child, or not more than two, then and in that case, she shall be entitled to one third part of the personal estate; but if such husband shall die leaving more than two children, then in that case, such widow shall share equally with all the children, she being entitled to a child's part.[1]

The same act also provides for the assignment of dower, and directs that the proceedings shall be conducted in a summary manner.[2]

[1] Public Acts N. C. vol. i. p. 353, ch. 22, § 8; Laws N. C. vol. i. p. 469; see, also, p. 673, § 1; Rev. Stat. N. C. vol. i. p. 612, ch. 121, § 1; Rev. Code N. C. (1855,) p. 601, § 1.

[2] Ibid. §§ 9, 10; Rev. Stat. N. C. vol. i. pp. 613, 614, §§ 2–5.

An act of 1791, relating to the liability of widows who take the estates of their husbands, for the debts of creditors, contains the following proviso:—

Nothing herein contained shall be construed to subject the dower of a widow in the lands of her deceased husband, nor such lands as may be devised to her by his will, if such lands do not exceed the quantity she would be entitled to by right of dower, to the payment of debts due from the estate of her husband, during the term of her natural life.[1]

An act passed in 1810 provides for the relinquishment of dower and the acknowledgment of deeds by married women.[2] In the statutes as revised in 1837, dower is given in equities of redemption and equitable estates of inheritance.[3]

16. *Tennessee.*—After the separation of Tennessee from North Carolina, and its organization under a distinct government, many of the laws of the latter State were re-enacted in the new territory. Among these are the North Carolina acts of 1715[4] and 1784,[5] which, indeed, form the basis of subsequent legislation in Tennessee on the subject of dower.[6] The early statute giving dower in equitable estates is as follows:—

Widows shall be entitled to dower out of equitable estates in lands of which their husbands were the owners at the time of their death, in the same manner that they are entitled to dower in the legal estates of which their husbands may have died seized, or possessed.[7]

17. *Georgia.*—The act of April 24th, 1760, confirmed conveyances previously made by husband and wife, and prescribed the form of acknowledgment in future conveyances.[8] In December, 1768, the

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[1] Public Acts N. C. vol. ii. p. 18, § 4; Laws N. C. vol. i. p. 674, ch. 351, § 4; Rev. Stat. N. C. vol. i. p. 615, § 8. Prior to the passage of the act of 1784, dower was given in North Carolina as at common law, in the lands of which the husband was seized during the coverture. Taylor *v.* Parsley, 3 Hawks, 125.

[2] Laws of 1810, p. 11.

[3] Rev. Stat. N. C. vol. i. ch. 121, p. 614, § 6; Rev. Code N. C. (1855,) ch. 118, p. 602, § 6.

[4] Ante, § 15; Laws Tenn. (ed. 1821,) vol. i. pp. 17, 18, § 6; (see note, p. 18;) Ibid. pp. 25, 28, § 13; Ibid. (ed. 1831,) vol. i. p. 227, § 13; Stat. Laws Tenn. by Car. and Nich. p. 497.

[5] Ante, § 15; Laws Tenn. (ed. 1821,) vol. i. pp. 292, 295, § 8; p. 296, §§ 9, 10; Laws Tenn. (ed. 1831,) vol. i. p. 77, §§ 8, 9; Stat. Laws Tenn. by Car. and Nich. p. 262, § 8; p. 463, §§ 9, 10.

[6] See Code of Tenn. (1858,) p. 473, ch. 3, "Dower."

[7] Laws Tenn. (ed. 1831,) vol. i. p. 77, (1823;) Stat. Laws Tenn. by Car. and Nich. p. 265; see, also, Code of Tenn. (1858,) p. 473.

[8] Laws of Georgia, by Prince, p. 109; Cobb's N. D. p. 161.

South Carolina act of 1698[1] was adopted with some immaterial verbal alterations.[2] The act of 1789, as amended in 1804, is as follows:—

When any person holding real or personal estate, shall depart this life intestate, the said estate, real and personal, shall be considered as altogether of the same nature, and upon the same footing, so that in case of there being a widow and child or children, they shall draw equal shares thereof, unless the widow shall prefer her dower, in which event she shall have nothing further out of the real estate than such dower; but shall, nevertheless, receive a child's part or share out of the personal estate. And in case any of the children shall die before the intestate, their lineal descendants shall stand in their place and stead; In case of there being a widow and no child or children, or representatives of children, then the widow shall draw a moiety of the estate, and the other moiety shall go to the next of kin in equal degree, and their representatives; If no widow the whole shall go to the child or children.

The act next provides for the distribution of the estate in case there be neither widow, child, nor children, nor legal representatives of the latter.[3] By an act passed in 1807 it was made the duty of widows, within one year after the death of their husbands, to elect as to the portion they would take of their husbands' estate. Upon failure to make such election, they were to be considered as having taken their dower or thirds, and to be barred from any other portion of the estate.[4] In 1826 an act was passed to amend the act of April 24th, 1760. It recites that the last-named act, in order to enable the husband to convey the entire interest which he has in lands and tenements, requires that the wife, by her own free consent, shall become a party in the conveyance with her husband, and relinquish to the purchaser her dower interest in the premises conveyed, and then proceeds to enact that from thenceforth the husband shall have full power, by his separate conveyance during coverture, to pass the entire estate. An exception was made as to lands which came to the husband by the marriage; and it was declared that nothing therein contained should impair the right of dower in all lands of which the husband should die seized and possessed.[5] By an amendment in 1842, sales and conveyances by sheriffs and other officers, under execution or other process, or order of court, in the

[1] Ante, § 13.

[2] Laws of Georgia, by Prince, p. 111, § 3; Hotchkiss' Stat. Law of Georgia, p. 430, § 10; Cobb's N. D. p. 162, § 3.

[3] Laws of Georgia by Prince, p. 161; see, also, p. 153.

[4] Ibid. p. 167.

[5] Cobb's N. D. p. 171. Prior to this statute the right of dower stood as at common law. Schrœder v. Chapman, 10 Geo. 323; Hart v. McCollum, 28 Geo. 478.

lifetime of the husband, were made as effectual to bar dower as conveyances executed by the husband himself.[1]

18. *Mississippi.*—The territorial act of December 22d, 1812, is a re-enactment of the North Carolina act of 1784,[2] with these modifications: All that part of the latter act which relates to fraudulent conveyances with intent to defeat dower, is omitted, and the law is so amended as to provide that in cases of intestacy, or where the widow dissents from the will within the time limited,

> She shall be entitled to dower in the following manner, to wit: One third part of all the lands, tenements and hereditaments of which her husband died seized and possessed, or had before conveyed, whereof said widow had not relinquished her right of dower as heretofore provided for by law.

The time within which to make the election was extended to one year. There were also some slight changes in the phraseology, not affecting the sense. The Virginia act of 1785,[3] giving dower in equitable estates, was adopted in the same year.[4] There was an express saving of dower in the acts of 1821 relating to wills, and regulating descents.[5] It was also provided that where there were no children, or descendants of children of the intestate, the widow should take one-half of the real estate for her dower.[6] But subsequently this was restricted to one-third where the estate proved insolvent.[7] In 1822 a statute was passed "to reduce into one the several acts and parts of acts relating to dower." It was substantially a re-enactment, in a connected form, of the then existing laws regulating the right of dower, and the mode of its assignment.[8] This act continued in force without material change, as regards the interests of the widow,[9] until the revision of 1857.[10] The modifications then introduced will be noted hereafter.

19. *Alabama.*—Alabama was separated from Mississippi, and

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[1] Cobb's N. D. 179. See Stat. Laws of Georgia, by Hotchkiss, ch. 16, p. 429, § 1.

[2] Ante, § 15; Dig. Stat. M. T. p. 254; see, also, p. 433, § 8; Rev. Code Missis. p. 230.

[3] Ante, § 5; post, ch. 19, § 20.

[4] Dig. Stat. M. T. p. 82; see, also, p. 478, act of Dec. 12th, 1816.

[5] Rev. Code Missis. p. 32, § 14, and p. 42.

[6] Ibid. p. 42, § 50.

[7] Ibid. p. 50, § 81.

[8] Rev. Code Missis. p. 230, ch. 37.

[9] How. & Hutch. Stat. Laws Missis. pp. 345 to 358; p. 402, § 60; Hutch. Missis. Code, p. 620, ch. 43; also pp. 608–617.

[10] Rev. Code Missis. 1857, pp. 337, 467, et seq.

erected into a distinct territory, in 1817. Many of the laws of Mississippi were continued in force in the new territory. Among these were the dower act of December 22d, 1812,[1] and the law giving the widow of an intestate whose estate was solvent one-half of his real estate for her dower where there were no children or their descendants, but restricting it to one-third in cases of insolvency.[2] The right was also given to elect between dower and the provision made for the widow by the will of her husband.[3] Subsequently the Virginia act of 1785,[4] extending the right of dower to equitable estates, was likewise adopted.[5]

20. *Rhode Island.*—The act of 1714, regulating conveyances, contains a section by which it is provided that dower shall not be barred by reason of any conveyance or mortgage made by the husband unless the wife join therein, or otherwise legally divest herself of her interest.[6] The statute of 1798 declares of what the widow shall be endowed, and directs the mode of assignment. Dower is thereby given in any lands whereof the "husband, or any other to his use was seized of an estate of inheritance at any time during the coverture, to which she shall not have relinquished her right of dower by deed."[7] The widow is permitted to remain in the mansion house and the messuage thereto belonging, free of charge, until her dower is assigned. She is to suffer no waste, and keep the premises in repair. The statute prescribes forms for the writ of dower and the writ of seizin.[8]

21. *Maryland.*—The charter granted by Charles I., in June, 1632, conferred upon Lord Baltimore and his heirs, power to make laws for the colony, "so nevertheless that the laws aforesaid be consonant to reason, and be not repugnant and contrary, but (so far as conveniently may be) agreeable to the laws, statutes, customs, and rights of this our kingdom of England."[9] In volume seven of the "Laws of Maryland," revised and published under the authority of the legislature, there is an appendix containing "the style of the ses-

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[1] Ante, § 18; Laws of Ala. (1823,) p. 258, ch. 1.
[2] Ante, § 18; Laws of Ala. (1823,) p. 886, § 17.
[3] Laws of Ala. (1823,) p. 884, § 11.
[4] Ante, § 5, post, ch. 19, § 20.
[5] Clay's Ala. Dig. p. 157, § 86.
[6] Re-enacted in 1764, 1798, 1804, and 1822; Laws of R. I. (1822,) p. 204, § 6.
[7] Re-enacted in 1818 and 1822; Laws of R. I. (1822,) p. 188, § 1.
[8] Ibid. §§ 2, 6. [9] Sec. 7.

sions, and the titles of all acts of assembly, in the order in which they passed, from the first settlement of the province, down to the year 1792." The "titles" of several of the early acts relating to real estate are given in this appendix, but not the acts themselves, so that it is impossible to say whether or not they contain anything concerning dower. But "an act for the enrolling of conveyances, and securing the estates of purchasers," being chapter two of the session of 1674, is published in full. The fifth section of this act provides that no married woman named as a party or grantor in any writing indented shall be barred, except upon her acknowledgment she is examined privately and apart from her husband, as to whether she makes the acknowledgment voluntarily and without coercion.[1] From this provision it is to be inferred that the common law right of dower was then recognized and established in the colony. The "act to direct descents" (1786) declares that nothing therein contained shall "be taken or construed to bar or affect any widow's right of dower."[2] In 1798 it was enacted that any provision by will made by the husband for his wife should be construed to be in lieu of dower unless otherwise expressed, and, in order to entitle herself to dower, the wife was required to renounce the provision in her favor within ninety days from the probate of the will.[3] Chapter forty-nine of the session of 1799 contained directions for assigning the widow's dower, in certain cases, or with her consent, making sale of the lands discharged from the incumbrance, she to receive a just proportion of the purchase money.[4] In 1818 dower was given in lands held by equitable title, unless devised by will before the passage of the act; but such right of dower was not to prejudice any claim for the purchase money of the lands, "or other lien on the same."[5]

22. *Vermont.*—The first legislation in Vermont was in 1778, but the laws of that year were not preserved.[6] Among the enactments

[1] Re-enacted in 1692, ch. 30, § 5; substantially in 1699, ch. 42, § 5; confirmed by act of 1676, ch. 2, and approved in 1715, ch. 57, § 4. See, also, Laws of 1704, ch. 24, § 9; Laws of Maryland, vol. vii. App.; Maryland Stat. by Marcy, vol. i. p. 127.

[2] Session 1786, ch. 45, § 6; Laws of Maryland, vol. vii.

[3] Dorsey's Laws Maryland, vol. i. pp. 406, 407; Laws, 1798, ch. 101, sub ch. 13, §§ 1–5.

[4] §§ 5, 6; Laws of Maryland, vol. vii.; see, also, act of 1816, 6 Laws of Maryland, ch. 154, §§ 10, 11; 3 Dorsey, 646.

[5] Session 1818, ch. 193, § 10, Laws of Maryland, vol. vii.; 3 Dorsey, p. 701.

[6] Verm. State Papers, 287, note.

of the February session, 1779, was "an act concerning the dowry of widows." In order that there might "be suitable provision made for the maintenance and comfortable support of widows after the decease of their husbands," it was provided

That every married woman living with her husband in this State, or absent from him elsewhere, with his consent, or through his mere default, or by inevitable Providence, or in case of divorce, where she is the innocent party, that shall not, before marriage, be estated by way of jointure, in some houses, lands, tenements, or hereditaments, for term of life, or with some other estate in lieu thereof, shall immediately, upon and after the death of her husband, have right, title, and interest, by way of dower, in and unto one third part of the real estate of her said deceased husband in houses and lands, which he stood possessed of in his own right at the time of his decease, to be to her during her natural life; the remainder of the estate shall be disposed of according to the will of the deceased, and where there is no will, according to law. Provided always, that this law doth not extend to the widows of those that have [been] or may be guilty of treason.[1]

Provision was also made for the assignment of dower, and the widow was to suffer no waste, upon pain of forfeiture of her estate. An act was passed at the same session to regulate the settlement of estates. It recited that by ancient and immemorial custom and common consent of the people, the estate, both real and personal, of intestates, had descended to and been distributed among the children or next of kin of the deceased; that courts of probate had generally superintended the division and distribution of such estates; that according to the ancient practice it was necessary that both the real and personal estate should be divided by the same court, in order to insure a just division thereof; also that some general rules of division and method of proceeding should be established by law; and it was therefore enacted that courts of probate should have full power to distribute the surplus of the goods and estate of any intestate remaining after payment of all debts and expenses, as follows:—

One third part of the personal estate to the wife of the intestate (if any be) forever; besides her dower or thirds in the houses and lands during life, where such wife shall not be otherwise endowed before marriage, and all the residue and remainder of the real and personal estate by equal portions to and among the children.[2]

The act of November 4, 1799, gave the widow a right of election between any provision made for her by will, and her dower, as in

[1] Verm. State Papers, 360.

[2] Ibid. p. 342.

cases of intestacy.[1] The clause limiting dower to the lands of which the husband died seized was carried into subsequent revisions of the statutes, and is still the law in that State.

23. *Kentucky.*—Kentucky was separated from Virginia in 1790, and many of the early statutes of the former were derived from the parent State. Among these was a portion of the eighth section of the Virginia act of 1705, chap. 33, giving dower "in manner as is directed and prescribed by the laws and constitutions of the kingdom of England;"[2] and also nearly all of chap. 62, and the whole of chap. 65, of the acts passed at the October session, 1785.[3] These statutes were adopted in Kentucky on the 19th of December, 1796.[4] By chap. 62 estates of *cestuis que trust* were made subject to dower. Chap. 65 established the right of quarantine until dower was assigned; provided redress in case of deforcement of dower; protected the widow against the consequences of the husband's laches, and collusive recoveries of his estate; prescribed the form of the writ in such cases; empowered the widow to bequeath the crops growing upon her dower lands; declared that adultery should bar dower unless the husband afterwards became reconciled to the wife; that a sufficient jointure should bar dower unless made after marriage, or if before marriage, during the infancy of the wife, in which event she was to elect between the jointure and her dower. In case of eviction from the jointure lands she was remitted to her right of dower.[5] The act of February 24, 1797, relating to wills, contained a saving of dower.[6] It was also declared that conviction of treason or felony should be no cause of forfeiture of dower.[7] By an act passed February 8, 1798, slaves were declared real estate, and made subject to dower.[8] A part of chap. 23 of the Virginia act of 1705,[9] providing that "where the nature of the case shall require it, any writ *de partitione facienda*, or of dower, may be sued forth and prosecuted to recover the right and possession of any slave or slaves,"

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[1] Laws 1799, p. 3; amended Oct. 30, 1818; Public Acts 1818, ch. 6.

[2] 3 Hen. Stat. at Large, 374, § 8; ante, § 5; 1 Litt. 516; Stat. of Ky. (1822,) vol. i. p. 444, § 8.

[3] 12 Hen. Stat. at Large, 157, 158, § 1; Ibid. 162–165, §§ 1–8.

[4] 1 Litt. 516, 567; Stat. of Ky. (1822,) vol. i. p. 315, § 14; pp. 444–446, §§ 1–8.

[5] See, also, Stat. of Ky. (1834,) vol. i. p. 448, § 14; pp. 573–576, §§ 1–8.

[6] Stat. of Ky. (1822,) vol. ii. p. 1242.

[7] 1 Litt. 466; Stat. of Ky. (1834,) vol. i. p. 527, title 58; p. 531, § 43.

[8] 2 Litt. 113; Stat. of Ky. (1822,) vol. ii. p. 1149; p. 1155, § 28; p. 1159, § 39.

[9] 3 Hen. Stat. at Large, 334, § 9; ante, § 5.

was also adopted.[1] The provisions of the Virginia act creating a forfeiture of dower in case of the removal of slaves, were likewise re-enacted.[2] On the 19th of December, 1801, an act was passed, the substantial provisions of which continued in force until quite recently, making the right of dower consummate upon the conviction of the husband of polygamy, and entitling the wife to have her dower assigned to her forthwith upon such conviction.[3]

24. *New Hampshire.*—"An act for recording deeds and conveyances," passed June 14, 1701, contained the following proviso:—

> Nothing in this act to be construed, deemed, or extended to bar any widow of any vendor or mortgagor of lands or tenements, from her dower, or right in or to such lands or tenements, who did not legally join with her husband in such sale or mortgage, or otherwise lawfully bar or exclude herself from such, her dowry, or right.[4]

The act of May 14, 1714, "for the convenient and speedy assignment of dower," prescribed the form of the writ in such cases; regulated the mode of special assignment where the property was incapable of division, and forbid waste.[5] A statute passed in 1718 provided for the distribution of insolvent estates, "saving unto the widow, if any there be, her right of dower according to law, in the houses and lands of the deceased."[6] "An act for the settlement and distribution of the estates of intestates," passed in the same year, authorized any person seized of lands in fee simple to dispose of the same by will, "to and among his children, or others, as he shall think fit, at his pleasure." If he died intestate, his estate was to be distributed, "one third part of the personal estate to the wife of the intestate forever; besides her dower, or thirds in the houses and lands during her life where such wife shall not be otherwise endowed before marriage."[7] An additional act "for the speedy and convenient assignment of dower," was passed on the 9th of February, 1791. This was followed by "an act relating to dower," passed December 13,

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[1] Body of Laws, 23; Stat. of Ky. (1822,) vol. ii. p. 1164, § 9. See, also, Stat. of Ky. (1834,) vol. ii. p. 1479, § 89.

[2] Ante, § 5; Stat. of Ky. (1822,) vol. ii. p. 1246, § 25; Stat. of Ky. (1834,) vol. ii. p. 1545, §§ 25, 26.

[3] 3 Litt. 70; Stat. of Ky. (1822,) vol. ii. pp. 986, 988, § 6; Stat. of Ky. (1834,) vol. ii. p. 1269, § 6; Rev. Stat. of Ky. (1852,) p. 249, § 10.

[4] Laws of New Hamp. (ed. 1771,) ch. 12, p. 20, § 2.

[5] Ibid. ch. 26, p. 37.

[6] Ibid. ch. 72, p. 102.

[7] Laws of New Hamp. (ed. 1771,) ch. 78, p. 104.

1804. The act of July 2d, 1822, gave judges of probate power to assign dower in the real estate of which the husband died seized and possessed.[1] In July, 1829, a new statute was passed embracing the whole subject of dower, and repealing the acts of 1791 and 1804. It limited the right to such lands as were in a state of cultivation during the husband's seizin, or were used or kept as a wood or timber lot, and occupied with, or as appurtenant to the farm or tenement owned at the same time by the husband. In case the husband had lost or parted with his title during his lifetime, the widow could only be endowed of so much of the lands as would produce a yearly income equal to one-third part of the yearly income thereof at the time of his decease.[2] By the present statute of New Hampshire the right of dower is restricted to the lands of which the husband died seized.[3]

25. *Pennsylvania.*—In this State, by a series of judicial decisions, and in the absence of any express enactment to that effect, the rule of the common law in respect to dower, so modified, however, as to give that right in equitable estates, is held to be in force. In addition to the common law right thus established, statutes were passed in 1794 creating what is termed "statutory dower," in which provision was made for the wife in those lands only in respect of which the husband died intestate, and that were not required for the payment of debts or expenses of administration. These statutes were substantially embodied in the act of April 8, 1833, which is still in force. The construction given this act, and the doctrine of the Pennsylvania courts limiting its operation to the lands of which the husband died seized, and recognizing the common law right of dower as existing in the lands disposed of by him in his lifetime, are sufficiently considered elsewhere.[4]

26. *Ohio.*—The ordinance of 1787 for the organization and government of the Northwest Territory, after providing for the descent of lands held by persons dying intestate, proceeds as follows:—

> Saving in all cases to the widow of the intestate her third part of the real estate for life, and one third part of the personal estate; and this law relative to descents and dower shall remain in full force until altered by the legislature of the district.

The first territorial law on the subject was published by the gov-

[1] New Hampshire Laws, (1830,) p. 342, § 28.
[2] Ibid. pp. 538–40, §§ 1–7; see, also, pp. 91, 339, 355.
[3] New Hampshire Comp. Laws, (1853,) p. 420, ch. 175, § 3.
[4] Ch. 20, §§ 18–21; ch. 29, §§ 36–40.

ernor and judges on the 14th of July, 1795, to take effect on the first of the ensuing October.[1] It was adopted from the Massachusetts statute of 1783, of which it is nearly an exact transcript.[2] It does not profess to alter the provisions of the ordinance as to dower, nor to define in what the right shall consist, but is simply an act "for the speedy assignment of dower in all lands, tenements, and hereditaments, whereof by law the widow is or may be dowable." It continued in force in Ohio until the 19th of January, 1804, when the State Legislature passed an act relative to dower, repealing the dower clause of the ordinance, and the adopted act of 1795. The following is the first section of the act of 1804:—

> The widow shall be entitled during her life to the use of one third part of all the real property that her husband was seized of during coverture, unless she shall have joined with her husband in the conveyance; the widow shall tarry in the chief house of her husband, and have a reasonable support out of the estate of her husband, until her dower be assigned her, and shall be entitled to one third part of the remainder of the personal property, after the debts are paid.[3]

This act was repealed by the statute of February 12, 1805, which enlarged the right, and extended it to equitable as well as legal estates:—

> The widow of any person dying intestate, or otherwise, shall be endowed of one full and equal third part of all the lands, tenements, or other estate of which her husband was seized as an estate of inheritance, at any time during the coverture, to which she shall not have relinquished her right of dower, by deed duly executed and acknowledged; and she shall, in like manner, be endowed of one third part of all the right, title, or interest that the husband, at the time of his decease, had in any lands and tenements held by bond, article, lease, or other evidence of claim; and until such dower be assigned, it shall be lawful for her to remain and continue in the chief mansion house, and the messuage or plantations thereto belonging, without being chargeable with rent for the same.[4]

In case the husband left a will in which provision was made for the wife, she was required to elect whether she would take by the will or her estate in dower.[5] No contract of the husband nor recovery against him during the coverture was to affect her right.[6] A sufficient jointure was to bar dower, unless made after marriage, or during the infancy of the wife, in which event she might, at her election, waive the jointure and demand her dower.[7] The widow was forbidden

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[1] 1 Chase's Stat. 187.
[2] Ante, § 7.
[3] 1 Chase's Stat. 395.
[4] 1 Chase's Stat. 472, § 1.
[5] Ibid. § 8.
[6] Ibid. § 4.
[7] Ibid. § 2.

to commit waste.[1] The mode of proceeding, and the manner of assigning dower were also prescribed by the same statute.

27. *Indiana.*—At the time of the passage of the ordinance of 1787, Indiana formed a part of the Northwest Territory, and, of course, was embraced within its provisions. That instrument, as we have seen, gave dower as at common law.[2] Ohio became a separate territory in 1799, the remainder of the territory retaining its territorial organization under the name of Indiana. In 1809 a further division was made, the eastern portion retaining the name of Indiana, and the western taking that of Illinois. In Indiana, in January, 1824, an act was passed containing the following provision:—

> The widow of any person dying intestate, or otherwise, shall be endowed of one full and equal third part of all the lands, tenements, and hereditaments, either legal or equitable, whereof her husband, or any other person to his use, was seized at any time during the coverture; and the dower of such widow shall not be considered as sold or extinguished by a sale of her husband's property, by virtue of any decree, execution, or mortgage.[3]

In a subsequent revision of the laws, the closing paragraph of the foregoing section was amended, by adding the words, "to which she may not be a party."[4] In 1838, the law was still further amended:—

> The widow of any decedent shall, in all cases not otherwise provided for in this act, be endowed of one full and equal third part of the lands, tenements, and hereditaments, the legal title to which vested in her husband, or any other person to his use, at any time during the coverture, unless the same be legally barred by the wife; and also of lands, tenements, and hereditaments to which, or any part thereof, the said husband was equitably entitled at the time of his death, unless barred or released as above. And the said husband shall be considered equitably entitled to any real property for which he has made a contract, in proportion to the purchase money actually paid in his lifetime. And the dower of said widow shall not be considered as sold or extinguished by a sale of her husband's property, by virtue of any decree, execution, or mortgage, to which she may not be a party.[5]

In the revision of 1843 additional changes were introduced. Dower was given in equitable estates as before; if the husband had purchased lands and paid the purchase money in full, so as to entitle him to a conveyance, the widow was dowable as fully as if the con-

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[1] 1 Chase's Stat. p. 473, § 13.

[2] Ante, § 26.

[3] Laws of Ind. (1824,) p. 157, ch. 33, § 1.

[4] Rev. Laws Ind. (1831,) p. 209, ch. 29, § 12.

[5] Act of Feby. 17, 1838; Rev. Stat. Ind. (1838,) ch. 29, p. 238, § 12.

veyance had been made; if the purchase money, in whole or in part, had not been paid, and upon his death it was paid out of the proceeds of his estate, she was, in like manner, entitled to dower as if the legal estate had vested in him during the coverture; if part only of the purchase money was paid, and after the death of the husband the premises were sold under any decree of a court of competent jurisdiction, or by virtue of any power or devise in his will, the widow was dowable only in proportion to the amount paid by the husband in his lifetime. Dower was also given in equities of redemption. Where the wife had joined in the mortgage, and after the death of the husband it was redeemed from his personal estate, the wife had dower in the whole estate.[1]

28. The foregoing provisions continued in force until 1852, when the entire system underwent a radical change. By the act of May 14, 1852, tenancy in dower is abolished.[2] At the death of a husband one-third of his real estate descends to his widow in fee simple, free from all demands of creditors; provided, however, that where the real estate exceeds in value ten thousand dollars, the widow shall have one-fourth only; and where it exceeds twenty thousand dollars, one-fifth only, as against creditors.[3] Subject to this exception, she is entitled to one-third of all the real estate of which the husband was seized in fee simple at any time during the coverture to which she has not relinquished her right; and also of all lands in which her husband had an equitable interest at the time of his death.[4] This right extends to lands purchased, but not conveyed, where the consideration, in whole or in part, is paid out of the husband's estate after his death; but if the lands purchased are not fully paid for, and are sold after the husband's death, either under a decree of a court, or in virtue of any power or devise in his will, she can take only in proportion to the amount of the consideration paid by him. It embraces, also, lands mortgaged, except as to the mortgagee, and persons claiming under him.[5] If the husband leave a will, the wife may elect to take under the will, or under the law.[6] No act or con-

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[1] Rev. Stat. Ind. (1843,) Art. IV. pp. 427–429, §§ 80–91.

[2] 1 Rev. Stat. Ind. (1852,) ch. 27, p. 250, § 16. This revision did not take effect until May 6, 1853; Noel *v.* Ewing, 9 Ind. 37; Strong *v.* Clem, 12 Ind. 37; Giles *v.* Gullion, 13 Ind. 487; Frantz *v.* Harrow, Ibid. 507; Talbot *v.* Armstrong, 14 Ind. 254.

[3] 1 Rev. Stat. Ind. (1852,) ch. 27, § 17.

[4] 1 Rev. Stat. Ind. (1852,) p. 251, § 27.

[5] Ibid. p. 253, §§ 29–31.

[6] Ibid. p. 252, § 27.

veyance of the husband, without the wife's concurrence, can impair her right.[1] If a widow marry a second, or any subsequent time, holding real estate in virtue of any previous marriage, such widow can not, during such marriage, with or without the assent of her husband, alienate such real estate; and if the widow die during the marriage, such real estate shall go to her children, if any there be, of the marriage in virtue of which it came to her.[2] It will be observed that the material change made in the law of dower by this statute is as to the *extent*, only, of the interest of the wife. An estate *in fee* in one-third part of the husband's lands is substituted for the life estate given at common law, and by the former statutes of Indiana.[3]

29. *Illinois.*—The act of July 14, 1795, "for the speedy assignment of dower," applicable, at the date of its passage, to the whole Northwest Territory,[4] was continued in force in Illinois for a number of years. It was re-enacted by the General Assembly of the State, February 12, 1819, and was not repealed until February 6, 1827.[5] At the last-named date a statute was passed "for the speedy assignment of dower and partition of real estate," which, as its title imports, directed the mode of procedure for the recovery and assignment of dower and the partition of lands.[6] It directed that the homestead or dwelling-house of the husband should be embraced in the assignment if the widow desired it.[7] It forbid waste on pain of forfeiture of that part of the estate on which the waste was committed.[8] It allowed the widow to retain in her possession the dwelling-house and outhouses and plantation thereto belonging free from rent until her dower was assigned.[9] A divorce by reason of the fault or misconduct of the wife barred dower.[10] Abandonment of the husband and the commission of adultery by the wife was to have the same effect, unless the husband afterwards became reconciled to her.[11] The act of January 23, 1829, contained the usual provision requiring the

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[1] 1 Rev. Stat. Ind. (1852,) p. 253, § 35. [2] Ibid. p. 250, § 18.

[3] Noel *v.* Ewing, 9 Ind. 37; see, also, Strong *v.* Clem, 12 Ind. 37; Giles *v.* Gullion, 13 Ind. 487; Frantz *v.* Harrow, Ibid. 507; Talbot *v.* Armstrong, 14 Ind. 254.

[4] Ante, § 26. The ordinance of 1787 continued in force in Illinois for some years after its organization under a separate territorial government; Purple's Dig. 1st ed. 30, 31; see ante, § 27.

[5] Purple's Dig. 1st ed. 409–10, and note; Ibid. p. 419, § 17.

[6] Ibid. 414; Rev. Laws Ill. (1833,) p. 236. [7] § 5. [8] § 6.

[9] § 8. [10] § 11. [11] § 12.

widow to elect between her dower and the devises and bequests in her husband's will.[1] By the same statute it was provided that

> Equitable estates shall be subject to the widow's dower, and all real estate of every description contracted for by the husband in his lifetime, the title to which may be completed after his decease.[2]

30. *Michigan.*—In 1796 Michigan was included under the government of the Northwest Territory, and from that period became subject to the ordinance of 1787, which established dower as it existed at common law.[3] The territorial act of July 27, 1818, relating to descents, and providing for partition in certain cases, contained a provision guarding the dower right of the widow;[4] and this provision was re-enacted in the statute of April 12, 1827.[5] By the Revised Statutes of 1838, dower was given as at common law.[6] The same statute gave dower in lands held subject to a mortgage, except as against the mortgagee and those succeeding to his rights.[7] These features of the law of 1838 are retained substantially in the statute now in force.[8]

31. *Missouri.*—In Reddick *v.* Walsh,[9] it was held that the territorial act of July 4, 1807, abolished the Spanish law of community formerly prevailing in Missouri, and gave the wife dower in lieu of her interest under that law. The same doctrine was affirmed in Reaume *v.* Chambers,[10] where it was determined that both dower and tenancy by the courtesy were introduced by that statute. The territorial act of January 21, 1815, gave the widow dower in all lands of which her husband was seized or possessed during the coverture, either by deed, patent, entry, or warrant of survey, to which she had not relinquished her right, except lands sold on execution or under a decree of foreclosure.[11] The act of 1817 made dower subject to debts. It provided that where an intestate left a child or children, the dower of his widow should be one-third of his estate "after all just demands against the said estate are paid." If the intestate left

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[1] Rev. Laws Ill. (1829,) p. 204, §§ 39, 40.

[2] Ibid. p. 207, § 49; see Rev. Stat. 1845, ch. 34, p. 198, § 1; Stat. of Ill. (1858,) vol. i. p. 151, § 1.

[3] Ante, § 26; May *v.* Rumney, 1 Mann. 1.

[4] Laws of Mich. (1820,) p. 29, § 4. [5] Laws of Mich. (1827,) p. 65, § 4.

[6] Rev. Stat. Mich. (1838,) p. 262, ch. 2, § 1. [7] Ibid. § 2.

[8] 2 Comp. Laws Mich. (1857,) ch. 89, p. 850.

[9] Reddick *v.* Walsh, 15 Misso. 519.

[10] Reaume *v.* Chambers, 22 Misso. 36; see, also, Lindell *v.* McNair, 4 Misso. 380.

[11] Territorial L. vol. i. p. 418; Ter. Dig. 210–212.

no lawful issue, the widow was to take as her dower one equal moiety of the estate of which he died seized—"after his just debts are paid."[1] The act of December 1, 1821, concerning wills and testaments, declared that if a testator made no mention of his widow in the will, as to her he should be deemed to have died intestate.[2] The act to direct descents and distributions passed January 11, 1822, contained a saving as to dower.[3] The act of February 5, 1825, gave dower in slaves.[4] And on the 2d of November, 1825, a statute was passed by which it would seem that the legislature intended to restore the former law making dower in lands paramount to the claims of creditors, and by implication to repeal the contrary provision in the act of 1817; for it was thereby enacted that no sale of lands by an administrator for the payment of debts should in any manner affect the widow's right of dower.[5] By the revised statutes of 1845 dower in the husband's lands is not subject to his debts. If the husband die without a child, or other descendant living, capable of inheriting, the widow has her election to take her dower discharged of the debts, or a certain share of the estate absolutely subject to debts.[6]

32. *Arkansas.*—Upon the separation of Arkansas from Missouri, and its erection into a separate territory in 1819, many of the laws of Missouri, including those relating to dower, were continued in force in the new territory for a considerable period of time.[7] In 1836 a State government was organized, and in the same year Arkansas was admitted into the Federal Union. Two years afterwards a revision of the statutes was made,[8] in which dower was given in all lands of which the husband was seized at any time during the coverture to which the wife had not relinquished her right.[9] A late enactment extends the right of dower (subject to debts) "to bonds, bills, notes, book accounts, and evidences of debt."[10] The provisions of

[1] Ter. Dig. 212, 213.

[2] Act of Decr. 1, 1821, § 4; Stokes *v.* Fallon, 2 Misso. 32.

[3] Act of Jany. 11, 1822; Stokes *v.* Fallon, 2 Misso. 32.

[4] See Rev. Code 1825, p. 790; Rev. Code 1835, p. 617; Davis *v.* Davis, 5 Misso. 183; Morrison *v.* Gemme, 31 Misso. 230.

[5] Ter. Dig. p. 57. See Stokes *v.* Fallon, 2 Misso. 32; Crittenden *v.* Johnson, 6 Eng. (Ark.) 94.

[6] Rev. Stat. 1845, p. 429, ch. 54, §§ 1–6.

[7] See Crittenden *v.* Johnson, 6 Eng. 94.

[8] Rev. Stat. Ark. (1838,) by Ball and Roane; Notes and Index by Pike.

[9] Ibid. p. 336, ch. 52.

[10] Act of Feby. 21, 1859; Laws of 1859, p. 299.

the dower act contained in the revision of 1838 are substantially still in force.[1]

33. *Maine.*—The Constitution of Maine, adopted on the separation from Massachusetts, bears date October 19, 1819. It contains a clause declaring that all laws then in force in the State, not repugnant to the constitution, shall remain in force until altered or repealed by the legislature, or until they expire by their own limitation.[2] In February, 1821, an act was passed "concerning dower." It gave to the widow dower

> In all such lands, tenements and hereditaments, of which the husband was seized in fee, either in possession, reversion, or remainder, at any time during the marriage, except where such widow by her own consent may have been provided for by way of jointure prior to the marriage, or where she may have relinquished her right of dower by deed under her hand and seal.[3]

By the same act the alien widow of any citizen of the United States was rendered dowable "in the same manner as other widows are by virtue" thereof.[4] The dowress was to be entitled to one-third the rents and profits until her dower was assigned.[5] The act also prescribed the mode of proceeding for the recovery of dower. By the law of March, 1821, relating to wills and intestate estates, the widow was permitted to waive the provisions of her husband's will and take her dower.[6] In directing the descent of intestate estates there was an express saving as to dower.[7] And it was provided that

> The widow of the deceased shall, in all cases, be entitled to her dower in the real estate, (where she shall not have been otherwise endowed before marriage,) and to a recovery of the same in manner as the law directs.[8]

Dower was also saved in lands taken on execution.[9] And in the act directing the mode of transferring real estate by deed there is this proviso:—

> Nothing in this act shall be construed to bar any widow of any vendor or mortgagor of lands or tenements, from her dower or right in or to such lands or tenements, who did not join with her husband in such sale or mortgage, or otherwise lawfully bar or exclude herself from such dower or right.[10]

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[1] Dig. Ark. Stat. (1858,) ch. 60, p. 450.
[2] Art. 4, § 8.
[3] Laws of Maine, (1821,) ch. 40, pp. 149, 150, § 6.
[4] Ibid. § 4.
[5] Ibid. § 5.
[6] Ibid. ch. 38, p. 142, § 15.
[7] Laws of Maine, (1821,) ch. 38, p. 142, § 17.
[8] Ibid. p. 143, § 18.
[9] Ibid. p. 281.
[10] Ibid. ch. 86, pp. 130, 131, § 2.

Some material changes were afterwards made in the laws of this State upon the subject of dower. They will be stated hereafter.[1]

34. *Florida.*—The territorial act of September 14th, 1822, passed the year following the cession of Florida to the United States, concerns "dower and jointures in lands and slaves, of widows." Devises or bequests to the wife by the husband are to be deemed and taken in lieu of dower in his estate, unless by the will he declare otherwise. But nothing in the act contained is to deprive the widow of her choice either to dower of the estate, or to the provision in her behalf made by the will. Her election must be made within one year from the death of the husband. In case she fail to elect, she is held to take under the will.[2] The territorial act of 1828 gives as dower one-third of the lands of which the "husband died seized and possessed, or had before conveyed, whereof said widow had not relinquished her right of dower, as heretofore provided for by law."[3] In 1838 an act was passed giving dower in slaves. It also provides that in all cases in which the widow is entitled to dower, she may elect, within twelve months after probate of the will or grant of letters of administration, either to take dower or a child's part in the estate. If she takes a child's part, her title is to be absolute; if dower, she takes a life estate only.[4]

35. *Wisconsin.*—The act of Congress of April 20, 1836, establishing the territorial government of Wisconsin, secured to the people of that territory all the rights and privileges conferred by the ordinance of 1787.[5] At a session of the territorial legislature commencing in November, 1838, and at an adjourned session commencing in January, 1839, several laws were passed relating to dower. It was enacted that a divorce, on account of the adultery of the wife, should bar dower.[6] The wife might release her right by joining in a conveyance with her husband.[7] Dower might be recovered by proceedings in ejectment; and the manner of assigning it, where it was so recovered, was prescribed.[8] If dower was not assigned within one

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[1] See Revision of 1840–41, and of 1857.

[2] Laws of Florida, (1824–35,) p. 55, § 1.

[3] Act of Nov. 7, 1828, § 1; Duval, 85; Thompson's Dig. 184.

[4] Act of Feb. 8, 1838; Duval, 87; Thompson's Dig. 185. The child's part here referred to is construed to mean a distributive share after payment of the debts. Ibid. note.

[5] Act of April 20, 1836, § 12; see ante, § 26.

[6] Stat. of Wis. (1839,) p. 140, § 5.

[7] Ibid. p. 180, § 11.

[8] Ibid. p. 250, § 2; pp. 256–7, §§ 51, 52.

month after demand made, the widow might sue therefor; and in such cases proper damages were to be awarded her, and upon recovery, a writ of seizin was to issue. In case no division could be made, the widow was to be endowed specially of the rents and profits.[1] By a subsequent statute, now in force, dower is given in all lands of which the husband was seized at any time during the coverture, and also in equities of redemption.[2]

86. *Iowa.*—On the 12th of June, 1838, by an act of Congress of that date, the territory of Wisconsin was divided, and that portion lying on the west side of the Mississippi River was established as a separate government, under the name of Iowa. The ordinance of 1787 continued in force in Iowa for a number of years thereafter,[3] and the provision relating to dower was regarded as a fundamental law of the territory.[4] At no time, until the adoption of the code of 1851, was the right of dower changed from what it was as established by that ordinance.[5] By the act of January 25, 1839, the dower of the wife consisted in a life estate in one-third of her husband's lands.[6] This statute was repealed by the acts of 1842–3,[7] leaving, however, the ordinance of 1787, so far as it regulated dower, still in force.[8] After the repeal of the law of 1839, there was no territorial statute defining the right of dower until that of June 10, 1845.[9] The sixth section of that statute provided that dower should be and remain as at common law.[10] Thus stood the law in Iowa until, by the code of 1851, the following modification was introduced:—

Sec. 1394. One third in value of all the real estate in which the husband, at any time during the marriage, had a legal or equitable interest, which has not been sold on execution or other judicial sale, and to which the wife has made no relinquishment of her right, shall, under the direction of the court, be set

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[1] Stat. of Wis. (1839,) pp. 308–9, §§ 56–58.

[2] Rev. Stat. Wis. (1849,) ch. 62, p. 338; Rev. Stat. Wis. (1858,) ch. 89, p. 545.

[3] The 12th section of the organic act provided that, until modified or repealed, the then existing laws of Wisconsin should extend over the new territory.

[4] Davis *v.* O'Ferrall, 4 Greene, 168; O'Ferrall *v.* Simplot, 4 Clarke, 381; Pense *v.* Hixon, 8 Clarke, 402.

[5] Pense *v.* Hixon, 8 Clarke, 402.

[6] Act of Jan. 25, 1839, p. 484, § 41; p. 485, § 44. See, also, act of Dec. 29, 1838, § 56.

[7] Rev. Laws, 1843, p. 725.

[8] Pense *v.* Hixon, 8 Clarke, 402. See, also, O'Ferrall *v.* Simplot, 4 Clarke, 381.

[9] Ibid. [10] Laws of 1845, ch. 21, § 6.

apart by the executor as her property in fee simple, upon the death of the husband, if she survive him.[1]

But by an act passed January 24, 1853, the foregoing section was repealed, and the following substituted in its stead:—

Section 1394. One third in value of all the real estate in which the husband, at any time during the marriage, had a legal or equitable interest, and to which the wife has made no relinquishment of her rights, shall, under the direction of the court, be set apart by the executor as her property in dower upon the death of the husband, if she survive him. Said estate in dower to be and remain the same as at common law.[2]

37. *Minnesota.*—By the organic act of Minnesota, passed March 3d, 1849, the laws of Wisconsin were continued in force, subject to modification by the Governor and Legislative Assembly of the Territory.[3] At the second session of the Legislative Assembly, commencing January 1st, 1851, the Wisconsin dower act was adopted without any material change,[4] and is still continued in force.[5] It gives dower, as at common law, in all estates of inheritance of which the husband was seized during the coverture, and also in equities of redemption.

38. *Oregon.*—With the exception of an occasional alteration in the phraseology, in no degree affecting the sense, the statute of Wisconsin above referred to, regulating the right of dower, and directing the mode of proceeding for the recovery thereof, is also adopted in Oregon.[6]

39. *Kansas.*—The dower act of Kansas, as adopted in 1855, in all its essential features is almost a literal transcript of the Missouri statute of 1845.[7] The revision of 1862 contains a section giving to the widow a right to elect whether she will take her dower, or the benefit of the provisions of "an act concerning descents and distributions," approved February 8, 1859, or of an act entitled "an act to protect the rights of married women, and in relation to the liabilities incident to the married contract relation," approved February 7, 1859.[8] The fifth section of the territorial act is omitted in this re-

[1] Code of Iowa, (1851,) p. 218, § 1394.

[2] Took effect July 1, 1853; Laws of Fourth Gen. Assem. ch. 61, p. 97, § 1; Revision of Laws of Iowa, (1860,) Art. 4, p. 420, § 2477.

[3] Act of March 3d, 1849, § 12.

[4] Stat. Minn. (1851,) ch. 49, p. 217.

[5] Stat. Minn. (1849–1858,) ch. 86, p. 407.

[6] Stat. of Oregon, (1855,) p. 404, ch. 1.

[7] Ante, § 32; Stat. Kan. Ter. (1855,) ch. 63, p. 314.

[8] Comp. Laws of Kansas, (1862,) ch. 83, p. 478, § 2; Acts of 1859, ch. 63, § 2.

vision; but in other respects the changes made are not important, so far at least as regards the nature and extent of the interest of the widow in the estate of her husband.

40. *Texas.*—The estate of dower had but a brief legal existence in Texas. An act passed January 26, 1839, by the Congress of the Republic conferred the right as it then existed in several of the neighboring States. The widow of an intestate, or of a testator who did not make a satisfactory provision for her by will, was entitled to dower in all the lands of which he died seized and possessed. If he died without legitimate heirs of his body or their descendants, then the widow took one-half his estate, both real and personal, for life.[1] But this statute was repealed February 5, 1840,[2] and no similar provision was ever re-enacted. The act relating to wills contains no clause saving dower.[3] The act of March 18, 1848, regulating descents and distributions, is to the following effect: If the intestate leave a child or children, or their descendants, the surviving husband or wife is entitled to one-third the personal estate, not including slaves, absolutely, and also to an estate for life in one-third the land and slaves; if there be no child or children, or their descendants, then the surviving husband or wife may take all the personal estate, and one-half the lands and slaves absolutely; if the deceased have neither surviving father nor mother, nor surviving brothers and sisters, or their descendants, then the surviving husband or wife is entitled to the whole estate.[4] The foregoing provisions, it will be observed, relate solely to the *descent* of *intestates'* estates. The power of disposition by will is unrestricted; and other enactments entirely exclude the idea of the existence of the right of dower. Thus all property, both real and personal, of the husband, owned or claimed by him before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands or slaves thus acquired, are declared his separate property. All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands or slaves thus acquired, are in like

[1] Hartley's Dig. pp. 285–287, Art. 861–868; Oldham & White's Digest, pp. 700–1, Art. 34–41.

[2] Hartley's Dig. p. 285; Oldham & White's Dig. p. 700.

[3] Act of Jan. 28, 1840, Hartley's Dig. 977. See, also, Oldham & White's Dig. p. 454.

[4] Oldham & White's Dig. p. 99, Art. 347; Hartley's Dig. p. 220, Art. 595.

manner made her separate property, the husband, however, during the marriage, being invested with the sole management of all such property.[1] All property reciprocally possessed by the husband and wife at the time the marriage is dissolved is regarded as common effects or gains, unless the contrary be satisfactorily proved. The *common* property may be disposed of by the husband during the coverture; it is liable for his debts, and for debts contracted for necessaries by the wife during the coverture. Upon the death of either, if there be no child or children, the remainder goes to the survivor; if there be a child or children, then the survivor takes one-half, and the balance goes to such child or children.[2]

41. *California.*—The statutes of California have abrogated the common law right of dower, and substituted in its stead a half interest in the common property. "No estate shall be allowed to the husband as tenant by courtesy upon the decease of the wife, nor any estate in dower be allowed to the wife upon the decease of the husband."[3] The property, real and personal, owned by the husband or wife before marriage, and that afterwards acquired by either, by bequest, devise, or descent, is treated as the separate property of the husband or wife respectively. All acquired during the marriage, except in either of the modes above specified, is regarded as common property. Upon the death of the husband or wife, one-half the common property goes to the survivor, and the other half to the descendants of the deceased, subject to the payment of his or her debts. If there be no descendants, then the whole goes to the survivor, subject to debts.[4]

42. *Louisiana.*—In Louisiana the rule of the civil law prevails, and the jurisprudence of that State contains nothing bearing any resemblance to the common law right of dower.

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[1] Act of March 13, 1848, § 2; Hartley's Dig. 734, Art. 2421; Oldham & White's Dig. 312, Art. 1393.

[2] Act of Jan. 20, 1840; Hartley's Dig. p. 737; Oldham & White's Dig. p. 313.

[3] Laws of Cal. (1850–53,) p. 813, § 10; Wood's Cal. Dig. p. 488, § 10; Beard *v.* Knox, 5 Cal. 252.

[4] Laws Cal. (1850–53,) pp. 812–814, §§ 1–13; Wood's Cal. Dig. pp. 486–489, §§ 1–13.

CHAPTER III.

OF MARRIAGE AS A REQUISITE OF DOWER.

§ 1. Valid marriage essential to dower.
2. The English marriage acts.
3. The regular and the irregular marriage.
§ 4–19. Marriage *per verba de præsenti* at common law.

1. MARRIAGE is an essential prerequisite to the right of dower. In order to entitle a woman to this provision, she must answer the description of a lawful wife.[1] It becomes important, therefore, in the outset of our investigations, to ascertain with as much certainty as the nature of the subject will admit of, what formalities are necessary in law to create a valid marriage; and having done this, then to inquire what circumstances, or pre-existing impediments, will render nugatory the ceremonial thus observed, and prevent it from conferring the civil rights pertaining to the legal marital relation.

2. In England, at the present day, questions relating to the validity of the marriage contract are of comparatively easy solution, for by the different marriage acts of that country, all marriages not solemnized in conformity to the provisions thereof are made absolutely void.[2] The first of these acts, commonly called Lord Hardwicke's, is contained in chapter thirty-three of 26 George II., passed in 1753. Although modified in some particulars, many of its material provisions still continue in force as the law regulating the marriage contract in England. But as that act, by its own terms, does not extend to Scotland, nor to any marriages solemnized beyond the

[1] 1 Roper, H. & W. 333; Park, Dow. 7; Co. Litt. 31 a. Mr. Macqueen notices, in rather caustic terms, the care Mr. Roper has taken in stating this proposition. Macq. H. & W. 169. But I have not suffered this to deter me from giving the subject that attention which, in the United States at least, its importance appeared to demand.

[2] Park, Dow. 9; Macq. H. & W. 7–12; Shelf. Mar. and Div. 28. The substance of these statutes is given in the Appendix of Mr. Jacob, (No. 1,) to Roper on Husband and Wife. The same note will be found in the Appendix to 2 Bright on Husband and Wife, with references to later statutes added. See, also, 2 Kent, 85, note.

seas,[1] the validity of marriages contracted in Scotland, Ireland, and the British colonies, remains wholly unaffected thereby.[2] It would seem to follow that, in the United States, except in so far as special local legislation has intervened to change the rule, the doctrine of the common law as it existed prior to the 26th of George II. prevails. It is to this point, therefore, we should direct our attention.

The Regular and the Irregular Marriage.

3. By the common law, males of the age of fourteen, and females of the age of twelve, were capable of contracting marriage.[3] The formalities to be observed depended upon the doctrines of the ecclesiastical courts.[4] Marriages were divided into two classes, the Regular and the Irregular.[5] In the regular marriage everything was presumed to be complete and consummated, both in ceremony and in substance, according to the prescribed formalities of the ecclesiastical law. In the irregular marriage everything was presumed to be complete in substance, but not in ceremony.[6] The class of irregular marriages comprised marriages *per verba de præsenti* and marriages *per verba de futuro cum copula;* for a promise of future marriage, when followed by sexual intercourse, was considered equivalent, in legal effect, to a contract *per verba de præsenti.*[7] The *regular* marriage was attended, as a matter of course, with all the civil rights and incidents of the complete marriage contract; but whether *irregular* marriages were equally favored in law, is one of the unsettled and vexed questions of the day.

Marriage per Verba de Præsenti at Common Law.

4. A marriage *per verba de præsenti* consisted in a mutual promise of present marriage between parties competent thereto; as when the man said to the woman, "I do take thee to my wife," who then answered, "I do take thee to my husband." No other ceremony was considered essential, nor did consummation by sexual intercourse add anything to its validity.[8] And it is said that the contract thus

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[1] Sec. 18. [2] Shelf. Mar. and Div. 29.

[3] Co. Litt. 33 a., 79 b.; 1 Roper, H. & W. 335; 2 Kent, 78; post, ch. 8, § 2, *et seq.*

[4] Shelf. Mar. and Div. 26; Jacob's note 1, App. Roper, H. & W.

[5] Shelf. Mar. and Div. 27; Halk. Dig. Mar. L. 29. [6] Ibid.

[7] Dalrymple *v.* Dalrymple, 2 Hagg. Con. R. 65–67; Shelf. Mar. and Div. 26; Jacob's note 1, App. Roper, H. & W.; 2 Kent, 87; Halk. Dig. Mar. L. 29, 64–66; Bishop, Mar. and Div. § 66.

[8] Swinburne on Spousals, 8; Dalrymple *v.* Dalrymple, 2 Hagg. Cons. R. 66, 82, 87; Shelf. Mar. and Div. 27; Bishop Mar. and Div. §§ 66, 67, and cases there cited.

entered into, in contemplation of the ecclesiastical law, amounted to complete matrimony; that it was indissoluble by any agreement of the parties, and rendered any subsequent marriage of either of them with any third person absolutely void.[1]

5. It appears to be satisfactorily established that, prior to the decree of the Council of Trent for the reformation of the marriage ceremonial, a simple matrimonial engagement, substantially in the terms above indicated, or in any other form expressive of the present consent of the parties to become husband and wife, was, by the general matrimonial law of Christian Europe, all that was deemed necessary to constitute an actual and legal marriage.[2] The decree of the Council of Trent, of the 11th November, 1563, made the presence of the parish priest and two witnesses essential to the validity of a marriage;[3] but the decrees of that body were never received as of authority in England,[4] and therefore the decree above referred to does not in any respect affect the rule of the common law. In many of the countries which refused to acknowledge the authority of that Council, no religious ceremony was considered necessary; but it is a controverted question whether this rule prevailed in England, Ireland, and Scotland, and this question has undergone a vast deal of discussion in the different tribunals of those countries.

6. One of the earliest reported cases, bearing upon this question, is Bunting *v.* Lepingwell,[5] decided in the time of Elizabeth. In that case it was adjudged that a contract *per verba de præsenti*, though not followed by consummation, was sufficient to avoid a second marriage actually consummated. But the question whether such a contract in and of itself amounted to *perfect* marriage did not arise in the case, nor was it referred to in the resolutions of the court as reported by Coke. The learned editor of Coke's Reports, however, in a note to the case, says: "By the canon law, which is the general law throughout Europe as to marriages, except where that has been altered by the municipal law of any particular place, a contract of

[1] Park, Dow. 8; Swinb. Spousals, 9, 13, 15; Shelf. Mar. and Div. 27, 33, 34; opinion of Lord Stowell in Dalrymple *v.* Dalrymple, 2 Hagg. Con. R. 69, 100.

[2] Shelf. Mar. and Div. 27; Bishop, Mar. and Div. § 153; Dalrymple *v.* Dalrymple, 2 Hagg. Con. R. 54.

[3] Canones et Decreta Concillii Trident. sess. 24, c. 1; Shelf. Mar. and Div. 17, note, and 19.

[4] Shelf. Mar. and Div. 18; Poynter, Mar. and Div. 13; Bishop, Mar. and Div. § 153.

[5] Bunting *v.* Lepingwell, 4 Co. 29; Moor, 169.

marriage entered into *per verba de præsenti*, is considered to be an actual marriage *per se*."[1]

7. In 1 Dyer's Reports, 105, b., will be found the following note: "Noy, attorney-general, in the Lent readings, 1632, held, that if a woman be divorced from her husband *causa præ contractus* with another *per verba de præsenti*, in that case, immediately by the sentence given in court, the marriage shall be completed between the said woman and the first husband without any of the rites performed *in facie ecclesiæ*." But in Paine's case,[2] where the same claim was made in argument, and the above opinion of Noy was cited in its support, Twisden, justice, denied that it was law, and said that the marriage must be solemnized before the parties could be completely baron and feme.

8. The case of Weld *v.* Chamberlaine[3] arose in the 35 of Charles II. It was tried upon an issue of "marriage or no marriage," and from the evidence it appeared that a person who had taken orders according to the Church of England in former times, but who had been ejected in 1663, contracted the parties in these words: "I, A. B. take thee, B. C. for my espoused, betrothed, and wedded husband until death," the person officiating speaking these words, the woman repeating them after him, and the man the like, *mutatis mutandis*. No ring was used according to the forms of the Common Prayer Book. The parties cohabited as husband and wife for ten years afterwards. Pemberton, Chief Justice, was inclined to think this a good marriage, there being words of contract, *de præsenti*, repeated after a person in orders; but, upon the request of counsel, a case was ordered to be made for further consideration. There appears, however, to be no report of the final result of the case.

9. The case of Collins *v.* Jessot[4] was decided in the 3d of Ann. According to the report of the case given in 6 Modern, Holt, Chief Justice, expressed himself as follows: "If a contract be *per verba de præsenti*, it amounts to an actual marriage, which the very parties themselves cannot dissolve by release or other mutual agreement; for it is as much a marriage in the sight of God as if it had been in *facie ecclesiæ*, but with this difference, that if they cohabit before marriage in *facie ecclesiæ* they are for that punishable by ecclesiastical censures; and if, after such contract, either of them lies with

[1] Note (A.)

[2] Paine's case, 1 Sid. 13.

[3] Weld *v.* Chamberlaine, 2 Shower's Rep. 300.

[4] Collins *v.* Jessot, 6 Mod. 155; 2 Salk. 437; Holt, 459.

another, they will punish such offender as an adulterer." In the report of the case given in Salkeld, the same judge is represented as holding "that a contract *per verba de præsenti* was a marriage, viz.: I marry you; you and I are man and wife; and this is not releasable." In Wigmore's case,[1] decided in 5 Ann, the opinion of Lord Holt is to the same effect. "By the canon law," he said, "a contract *per verba de præsenti* is a marriage; as, I take you to be my wife."[2]

10. In The King *v.* Fielding,[3] a marriage solemnized in England by a Roman Catholic priest was held good as a marriage *per verba de præsenti*, on evidence of words of present contract spoken in English, the rest of the ceremony being read in the Latin tongue, which the witnesses present did not understand; and this case, and also the views of Lord Holt, in Collins *v.* Jessot, were approved by the court in the comparatively recent case of Rex *v.* Brampton, determined in the 49 of George III.[4] In that case certain British subjects in St. Domingo, in the year 1776, undertook to contract a marriage by having the ceremony performed in a chapel in a town where they were temporarily residing, by a person appearing there as a priest, and officiating as such. The service was in French, but was interpreted into English by one who officiated as clerk, and it was understood by the parties at the time to be the marriage service of the Church of England. Afterwards the parties cohabited as husband and wife for eleven years, and until the death of the husband, and the question then arose whether the marriage was legal. The court were unanimously of opinion that it was. "I may suppose," says Lord Ellenborough, "in the absence of any evidence to the contrary, that the law of England, ecclesiastical and civil, was recognized by the subjects of England in a place occupied by the king's troops, who would implicitly carry the law with them. It is then to be seen whether this would have been a good marriage here before the Marriage Act. Now certainly a contract of marriage *per verba de præsenti* would have bound the parties before that act, and this appears to have been *per verba de præsenti*, and to have been celebrated by a priest, that is, by one who publicly assumed the office of a priest, and appeared

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[1] Wigmore's Case, 2 Salk. 438; Holt, 459.

[2] And see 4 Bacon's Ab. 530.

[3] The King *v.* Fielding, 5 St. Tr. 610.

[4] Rex *v.* Brampton, 10 East, 282.

habited as such; of what persuasion, whether Roman Catholic or Protestant, does not appear."[1]

11. The case of Latour *v.* Teesdale[2] was of the same character. It involved the legality of a marriage which took place between two subjects of Great Britain, in October, 1808, at Madras, in the East Indies. The marriage was solemnized by a Catholic priest according to the rites of the Catholic Church, and was followed by cohabitation. It had uniformly been the custom to obtain the license of the governor, but this was not done in the present case. The marriage was pronounced valid according to the common law of England as it existed prior to the Marriage Act. Gibbs, Chief Justice, said: "In this country we judge of the validity of a marriage by what is called the Marriage Act, but as that statute does not follow subjects to foreign settlements, the question remains whether this would have been a valid marriage here before that act passed. The important point of the case, viz., what the law is by which such a question is to be governed, was most ably and fully discussed in the case of Dalrymple *v.* Dalrymple, which has been so often alluded to, and the judgment of Sir William Scott has cleared the present case of all the difficulty which might, at a former time, have belonged to it. From the reasonings there made use of, and from the authorities cited by that learned person, it appears that the canon law is the general law throughout Europe as to marriages, except where that has been altered by the municipal law of any particular place. From that case, and from those authorities, it also appears that, before the Marriage Act, marriages in this country were always governed by the canon law, which the defendants, therefore, must be taken to have carried with them to Madras. It appears, also, that a contract of marriage, entered into *per verba de præsenti*, is considered to be an actual marriage; though doubts have been entertained whether it be so unless followed by cohabitation. In the present case a ceremony was performed, the regularity of which it is unnecessary to discuss, because it was followed by cohabitation. All that is requisite, therefore, by the canon law, has been amply satisfied."

12. The case of Dalrymple *v.* Dalrymple,[3] referred to in the fore-

[1] And see the remarks of Lord Kenyon in Reed *v.* Passer, Peake's Cas. 232, where he pronounces a contract de præsenti, "*ipsum matrimonium.*"

[2] Latour *v.* Teesdale, 8 Taunt. 830; 4 Eng. C. L. R. 299.

[3] Dalrymple *v.* Dalrymple, 2 Hagg. Con. R. 54; 4 Eng. Ec. R. 485. A full statement of the case is also contained in Halkerston's Dig. of the Marriage Law of Scotland, pp. 380 to 394 inclusive.

going opinion of Chief Justice Gibbs, was a suit brought in the Consistory Court of London to affirm a Scotch clandestine marriage, decided by Lord Stowell in 1811, and appealed to the Court of Arches, and thence to the High Court of Delegates, and decided by the latter in the year 1814. It had been preceded by the case of McAdam *v.* Walker,[1] which was instituted in 1805, and passing through the Scotch courts, was eventually carried to the House of Lords, and there decided in 1813. In both these cases the marriages had been contracted without clerical aid, and in every court where the question of their validity was considered, they were held good. So far as Scotland is concerned, these decisions are regarded as forever putting the question at rest.[2]

13. Although the Dalrymple case arose in Scotland, it was, for a number of years, commonly understood as settling the law for those portions of the British dominions not embraced within the operation of the Marriage Act, and as declaratory, indeed, of the ancient matrimonial law of England. The decision was admitted on all hands to be in accordance with the principles of the continental system as administered prior to the Council of Trent, and it was supposed no good reason could be urged why England should stand as an exception to the application of that general rule. Accordingly we find some of the English text writers, whose works were published anterior to the case of The Queen *v.* Millis, noticed hereafter,[3] giving it as an established principle in the law, that a contract of marriage *per verba de præsenti*, without the aid of the sacerdótal office, or the presence of any one clothed in holy orders, constituted, before the Marriage Act, a legal marriage.[4] And a case[5] occurring shortly before that of The Queen *v.* Millis, is referred to in Jacob's Appendix, No. 1, to Roper on Husband and Wife,[6] where, upon the trial of an issue out of Chancery on the legitimacy of a person born before the Marriage Act, the Lord Chief Justice of the King's Bench is said to have ruled, that at that period a contract of matrimony *per verba de præsenti* amounted to a perfect legal marriage. On a motion for a new trial, the question was elaborately argued before the Lord Chancellor, but did not ultimately call for a decision.

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[1] McAdam *v.* Walker, 1 Dow. 148; Halkerston's Dig. of Mar. Law, 436.

[2] Bishop, Mar. and Div. § 158; 1 Fras. Dom. Rel. 87 *et seq.*; Halkerston's Dig. Mar. Law, 64–68. And see Macqueen, H. & W. 6.

[3] Post, § 15.

[4] Shelford, Mar. and Div. 31; Park on Dower, 8.

[5] Beer *v.* Ward.

[6] See, also, 2 Bright, Husb. and Wife, 369.

14. But shortly after the judgment of the court in the case last referred to, Mr. Jacob, the learned editor of "Roper on Husband and Wife," prepared an elaborate article, evincing great learning and industry, in which he sought, upon a careful review of all the adjudged cases, and by the aid of such light as was furnished by different legislative enactments, to show that the views of the lord chief justice, as expressed in Beer *v.* Ward, had no support in the common law of England.[1] It would be a work of supererogation to here recapitulate his arguments, or review the authorities which he cites, inasmuch as the article itself is accessible to all who desire to consult it. His conclusion as to the result of the authorities is thus stated: "The various authorities here adduced establish the proposition that, according to the law administered in England before the Marriage Act, a matrimonial contract *de præsenti* was essentially distinct from a marriage solemnized by a person in holy orders; that it did not confer on the woman the right to dower; on the man the right to the woman's property; or on the issue the rights of legitimacy; and that it did not render a subsequent marriage with a third person *ipso facto* void at law, though it formed a ground for a sentence annulling it. They seem also to show that, according to the ecclesiastical law, the contract did not give any right, except to call for a performance of it by actual solemnization, not justifying cohabitation, and not conferring conjugal rights; and that at the common law it had no effect, though in cases, where the parties cohabited and were reputed to be man and wife, this might be sufficient evidence for the purposes of some actions in which strict proof was not required."[2]

15. In the case of The Queen *v.* Millis,[3] which in 1844 came before the House of Lords on an appeal from Ireland, the above views substantially were held to be law. That case was a prosecution for polygamy. The defendant Millis was a member of the Established Church; he was married in Ireland to a woman who was either a member of the same church or a dissenter. The ceremony was performed by a Presbyterian minister according to the form usually observed by Presbyterian dissenters. The parties afterwards cohabited for two years as husband and wife. Subsequently, and while this woman

[1] App. (No. 1,) Roper on H. and W.; 2 Bright, H. and W. 869.
[2] 2 Roper, H. and W. 474; 2 Bright, H. and W. 897.
[3] Queen *v.* Millis, 10 Cl. & F. 534.

was living, he married in England another woman, observing, in all essential particulars, the requirements of the Marriage Act. Thereupon an indictment was found against him in Ireland for polygamy, and the question was whether the first marriage was sufficient to sustain the indictment. It was clear that it contained all the requisites of a contract *per verba de præsenti*, and if, by the common law of England, such a contract constituted a legal marriage, the defendant was guilty as charged. The Irish judges were about equally divided in opinion. While the case was pending before the English lords, they consulted the common law judges of England, who unanimously advised that the first marriage, as a foundation for the indictment, was invalid. The lords who gave judgment were equally divided; Brougham, Denman, and Campbell concurred in holding the first marriage good, while Lord Chancellor Lyndhurst, Cottenham, and Abinger were of a contrary opinion. The rule *semper præsumiter pro negante* was applied, and judgment rendered for the defendant. The question was most thoroughly considered and elaborately discussed. Indeed, the arguments of counsel, the opinions of Chief Justice Tindall and of the lords above named who gave their views *seriatim*, appear to have entirely exhausted the subject.[1] The case of Catherwood *v.* Caslon,[2] which was an action for criminal conversation, involved a similar question, and final judgment was suspended until the determination of The Queen *v.* Millis, then pending in the House of Lords; and afterwards judgment was rendered in conformity to the decision given in that case.

16. The case of The Queen *v.* Millis is supposed by some to be decisive of the question, and to settle it permanently in England and her colonies. Accordingly we find one of the most approved text writers on the subject of the marriage contract, of modern times, stating it as a settled proposition, on the authority of that case, that the ancient matrimonial law of England differed essentially from that which had obtained in Scotland, and also on the continent anterior to the decree of the Council of Trent.[3] "This," he says, "I take to have been the great point established in the case of the Irish marriage above referred to; which, though carried in the House of Lords with infinite difficulty, and in spite of many strong, and as

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[1] Bishop, Mar. and Div. §§ 159, 160.

[2] Catherwood *v.* Caslon, 13 Meeson & Welsby, 261.

[3] Macqueen, H. and W. 2–6.

some think, insuperable arguments opposed to it, must henceforth be regarded as settled and concluded in all legal reasoning on the subject; the short general proposition derivable from the adjudication being that, by the ancient law of England, a marriage by private contract was good only for certain purposes, and those not the most important ones; no marriage being absolutely perfect until celebrated in *facie ecclesiæ* by the intervention of a person in holy orders; that is to say, orders conferred by Episcopal authority."[1] And he remarks further that a private marriage or contract *de præsenti* "was, in the first place, not sufficient to give the woman the right of a widow in respect to dower; nor secondly, to give the man the right of a husband in respect of the woman's property; nor thirdly, to render the issue begotten legitimate; nor fourthly, to impose upon the woman the disabilities of coverture; nor fifthly and lastly, to make the marriage of either of the parties (living the other) with a third person void; all these consequences being confined exclusively to marriages solemnized in *facie ecclesiæ*."[2]

17. Notwithstanding the weight of authority naturally and reasonably attaching to The Queen *v.* Millis, the result arrived at in that case is not regarded as entirely satisfactory, even in England and the British colonies. The fact that the question was decided by a divided court, and that the ecclesiastical judges who, by reason of their peculiar pursuits, are supposed to be better qualified than the common law judges to solve questions relating to the marriage contract, were for sustaining the marriage, goes very far to weaken the effect of the decision as a binding authority in other cases. In Catterall *v.* Catterall,[3] which was a suit for divorce on the ground of adultery, determined in the Consistory Court of London in 1847, Dr. Lushington held that a marriage contracted *per verba de præsenti* before a Presbyterian clergyman in New South Wales was a sufficient foundation for the divorce. "I am not disposed," said the learned doctor, "to carry the decision in that case—(The Queen *v.* Millis)—one iota further than it went, for two reasons: first, as the law lords were divided, it was only in consequence of the form in which that case came before them there could be considered to be a judgment at all; in the second place, were I to hold the presence of a priest in the orders of the Church of England to be necessary, I should be going the length of depriving thousands of couples, married

[1] Page 6. [2] Pages 4, 5. [3] Catterall *v.* Catterall, 1 Robertson, 580.

in the colonies and the East Indies, (where till of late there were no chaplains,) of the right to resort to this court for such redress as it can give in cases of cruelty or adultery. Until I am controlled by a superior authority, for no further examination of the question will induce me to change *my* opinion, most unquestionably I shall hold in this and all other similar cases that, where there has been a fact of *consent* between two parties to become man and wife, such is a sufficient marriage to enable me to pronounce, when necessary, a decree of separation." The court also held that this marriage could not be decreed void in a suit for nullity.[1]

18. In a still more recent case the Court of Queen's Bench in Ireland decided that a clergyman may marry himself, and Perrin, J., in his opinion denied that The Queen *v.* Millis was an authority to bind the court; because, while three learned and eminent law lords held one opinion, three as equally learned and distinguished pronounced an opinion the other way.[2] The Court of Queen's Bench of Upper Canada have also intimated an opinion in accordance with the above views of Mr. Justice Perrin.[3] It would seem, therefore, notwithstanding the decision in The Queen *v.* Millis, that the question can not be regarded as conclusively settled even in England.

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[1] Catterall *v.* Sweetman, 1 Robertson, 304.

[2] Beamish *v.* Beamish, 1 Jur. N. S. part ii. for Nov. 1855; Bishop, Mar. and Div. p. 164, § 178, note.

[3] Doe *v.* Breakey, 2 Upper Canada Q. B. N. S. 349.

CHAPTER IV.

OF MARRIAGE PER VERBA DE PRÆSENTI IN THE UNITED STATES.

§ 1, 2. Views of American commentators.
3–8. The doctrine in New York.
9. Maryland.
10. New Jersey.
11. Pennsylvania.
12. California.
13. Ohio.
14. Louisiana.
15, 16. Kentucky.
17. Alabama.
§ 18. Texas.
19, 20. Massachusetts.
21–24. Maine.
25–27. New Hampshire.
28. Tennessee.
29, 30. Vermont.
31. Mississippi.
32. North Carolina.
33, 34. Rule as held in the Supreme Court of the United States.

1. It is not a little remarkable that while English writers and English judges have differed so widely as to the rule of the common law with reference to the marital contract, the law writers upon this side the Atlantic have, with entire unanimity, concurred in supporting the rule as generally understood in England before the decision in The Queen *v.* Millis. Thus, Chancellor Kent says:[1] "No peculiar ceremonies are requisite, by the common law, to the valid celebration of the marriage. The consent of the parties is all that is required; and as marriage is said to be a contract *jure gentium*, that consent is all that is required, by nature or public law. If the contract be made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, and which the parties (being competent as to age and consent) can not dissolve, and it is equally binding as if made in *facie ecclesiæ*. There is no recognition of any ecclesiastical authority in forming the connection, and it is considered entirely in the light of a civil contract. This is the doctrine of the common law, and also of the canon law, which governed marriages in England prior to the marriage act of 26 Geo. II., and the canon law is also the general law throughout Europe as to marriages, except

[1] 2 Com. 86, 87.

where it has been altered by the local municipal law." The cases cited in support of these views, omitting the American cases, are Jesson *v.* Collins, Dalrymple *v.* Dalrymple, Latour *v.* Teesdale, and M'Adam *v.* Walker, all of which are noticed in the preceding chapter, and were carefully considered by the judges and law lords in The Queen *v.* Millis.

2. Judge Reeve, in his work on the Domestic Relations, is equally clear and decided in his views:[1] "There is nothing," he says, "in the nature of a marriage contract that is more sacred than that of other contracts, that requires the interposition of a person in holy orders, or that it should be solemnized in a church. Every idea of this kind, entertained by any person, has arisen wholly from the usurpation of the Church of Rome on the rights of the civilian. She claimed the absolute control of marriages on the ground that marriage was a sacrament, and belonged wholly to the management of the clergy. The solemnization of a marriage by a clergyman was a thing never heard of among primitive Christians until Pope Innocent III. ordered it otherwise. The only ceremony in practice among them, was, for the man to go to the house where the woman dwelt, and, in the presence of witnesses, to lead her away to his own house. It is a mere civil transaction, to be solemnized in such a manner as the legislature shall direct, whether by a clergyman or any other person." In a note[2] to the text the editor refers to and approves the views of Chancellor Kent quoted in the preceding section; and he adds: "The doctrine that the contract of marriage rests upon the same footing, so far as its valid inception is concerned, is probably the doctrine of both the common and the civil law. The consent of parties, without any peculiar forms or ceremonies, is all that is required to its valid celebration." But no additional English authority except the case of Bunting *v.* Lepingwell (from Coke's Reports) is referred to. Professor Greenleaf, in an edition of his work on Evidence, published since the decision of The Queen *v.* Millis, does not hesitate to adopt, and indorse without qualification, the views of Chancellor Kent and Judge Reeve;[3] and Mr. Bishop, in his recent work on Marriage and Divorce, after very full consideration of the question, arrives at the same result. "Chancellor Kent, Judge Reeve, and Professor Greenleaf," he remarks, "in their

[1] Reeve's Dom. Rel. p. 196. [2] Note 1.

[3] 2 Greenl. Ev. 2d ed. § 460.

text-books, have considered clerical intervention at common law unnecessary, and this may well be deemed the American doctrine. The doctrine, otherwise expressed, is, that the marriage, by mere consent, as explained in our fifth chapter, is good throughout the United States, except in some States where local statutes have provided otherwise."[1] Notwithstanding this concurrence of opinion on the part of the text writers, however, an examination of the adjudged cases in the United States will show much the same contrariety of decision as has existed in Great Britain.

3. *New York.*—Fenton *v.* Reed,[2] decided in 1809, is the earliest reported case, involving this question, determined in New York. A married woman, whose husband had been absent in foreign parts for about seven years, and reported and believed to be dead, contracted a second marriage. Subsequently the first husband returned, and continued to reside in the neighborhood some eight years, when he died. He made no objection to the connection subsisting between his wife and the second husband, and never in any manner interfered with it. After his death they continued to cohabit as husband and wife for about six years, at the expiration of which time the second husband deceased. There was no proof that any contract of marriage had been solemnized between them subsequent to the death of the first husband. The question arose whether these facts were sufficient to establish a legal marriage so as to make the woman the widow of the man last deceased. The court determined the question in her favor upon two grounds: first, because proof of an actual marriage was not necessary, strict proof being only required in prosecutions for bigamy and actions for criminal conversation; and under the circumstances proved it might fairly be presumed that an actual marriage had taken place after the death of the first husband; secondly, because, in the language of the court, "no formal solemnization of marriage was requisite. A contract of marriage made *per verba de præsenti*," they said, "amounts to an actual marriage, and is as valid as if made *in facie ecclesiæ*." The first proposition was affirmed in the same court, in the case of Jackson *v.* Claw, decided in 1820.[3]

4. In Jackson *v.* Winne,[4] the ceremony was performed by a justice of the peace, but it was made a question whether the man had con-

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[1] Bishop, Mar. and Div. § 162.
[2] Fenton *v.* Reed, 4 John. 52.
[3] Jackson *v.* Claw, 18 John. 346.
[4] Jackson *v.* Winne, 7 Wendell, 47.

sented to the marriage. While in custody upon a charge of bastardy, the magistrate before whom he was taken inquired of him and of the woman who had preferred the charge, if they consented to be married. The justice also directed them to join hands, whereupon the defendant dropped his hand and turned from the complainant. She immediately took his hand and held it until they were pronounced husband and wife. Upon the refusal of the defendant to take the hand of the woman, the justice hesitated, but after a moment's delay proceeded and concluded the ceremony. During the whole time the defendant said nothing. Three days afterwards the defendant married another woman, with whom he cohabited until her death; after that event he contracted still another marriage. The complainant also married, and continued to reside with the husband of the second marriage until his death. It was contended by counsel that what took place before the justice did not amount to a marriage; or if the consent of the man could be implied from the circumstances, the marriage contract was nevertheless void, as made under duress. In delivering their opinion, the court employed the following language: "The maxim of the civil law, *nuptias non concubitus sed consensus facit*, Dig. L. 50, tit. 17, § 30, or one of the same import, has ever been regarded in courts of common law as a good definition of marriage. There is an expression in Wood's Institutes of the Laws of England, Inst. 57, which, if examined without its context, might seem to imply that cohabitation, as well as consent, was required to make a valid marriage. 'Marriage, or matrimony,' he observes, 'is an espousal *de præsenti*, and a conjunction of man and woman in a constant society;' but the very next sentence is a translation of a Latin maxim similar to the one quoted from the civil law. 'Mutual consent,' he says, 'makes the marriage before consummation.' The language of Jacob, in his Dictionary, tit. Marriage, is less liable to misconstruction. He says, 'Nothing more is necessary to complete a marriage by the laws of England, than a full, free, and mutual consent between parties' not incapable of entering into such a state.' Wood, in his Institutes of the Civil Law, p. 120, says that 'Espousals *de præsenti*, or marriage, is contracted by consent only, without carnal knowledge.'" And the court, being satisfied from the evidence that the defendant in the bastardy proceeding had, in contemplation of law, consented to the marriage, adjudged it sufficient, although the effect of this decision was to bastardize the issue of his subsequent marriages.

5. The case of Rose *v.* Clark[1] was determined by Chancellor Walworth, in January, 1841. He appears to have been decidedly of the opinion that by the ancient common law of England a marriage was invalid unless celebrated in *facie ecclesiæ*,[2] relying in support of this view upon the decision in the case of Del Heith, determined in the fourteenth century, (34 Edw. I.,) a report of which is found in Nicolas' Adult. Bast. 31, 567; and also upon Foxcroft's case, decided in 10 Edward I., a brief note of which is contained in 1 Roll. Ab. 359, and in 4 Viner's Ab. 218, pl. 18. He adds, however, that the law on this subject was unquestionably changed at the Reformation, if not before. "For," he observes, "it is now a settled rule of the common law, which was brought into this State by its first English settlers, and which was probably the same among the ancient Protestant Dutch inhabitants, that any mutual agreement between the parties to be husband and wife in *præsenti*, especially where it is followed by cohabitation, constitutes a valid and binding marriage, if there is no legal disability on the part of either to contract matrimony."[3]

6. This case was shortly followed by that of Starr *v.* Peck,[4] where it was, in like manner, held by the Supreme Court of the State, that at common law no formal ceremony was necessary to give validity to a marriage, and that a contract between the parties, *per verba de præsenti*, was sufficient. "It is true," said the court, "that the parties had power to contract marriage *inter se* before the husband went to sea, without the intervention of a clergyman."[5] And the judge, who delivered the opinion of the court, concluded as follows: "The evidence in the case at bar may, I think, be considered quite strong that Abby's parents had, before her birth, made a contract of marriage, either *per verba de præsenti* or *futuro;* and whether in the one form or the other, the consummation which resulted in her birth, according to the cases cited, rendered the marriage complete."

7. Clayton *v.* Wardell,[6] decided by the Court of Appeals, arose after the determination of The Queen *v.* Millis, and that case is alluded to by some of the judges in their opinions; but the court adhered to the views expressed in the previous cases, and declined

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[1] Rose *v.* Clark, 8 Paige, Ch. R. 574.
[2] See p. 579.
[3] See, also, In the matter of Taylor, 9 Paige, 611, 615.
[4] Starr *v.* Peck, 1 Hill, 270.
[5] Page 272.
[6] Clayton *v.* Wardell, 4 Comst. R. 280.

to adopt the more recent English doctrine. "A valid marriage," observed Cowen, Judge, "may exist without any formal solemnization. By the ancient common law of England, marriage, being regarded as a sacrament, must, to be valid, have been celebrated in *facie ecclesiæ*. But since the Reformation it has been regarded as a civil contract. And, like every other contract, all that is necessary for its validity is the deliberate consent of competent parties entering into a *present agreement* to take each other for husband and wife." And Gardiner, Judge, although he dissented from the final conclusion of the court, nevertheless concurred in the views above expressed. "Whatever may be the rule now in England," he remarked, "with us, marriage has always been considered as a civil contract, which, if made *per verba de præsenti*, without cohabitation, is valid."[1]

8. In Jacques *v.* The Public Administrator,[2] the surrogate expressed grave doubts as to the propriety and expediency of adopting the supposed rule of the common law; and in Turpin *v.* The Public Administrator,[3] these doubts were repeated. But the late case of Cheney *v.* Arnold[4] may perhaps be regarded as finally settling the question in New York, for while in that case the Court of Appeals repelled the doctrine that a contract *per verba de futuro*, followed by *copula*, constituted a good marriage, they held expressly that a contract *per verba de præsenti* was sufficient. After a full discussion of the question, the court say: "It follows that the doctrine of the canon law that a contract of marriage *per verba de futuro*, followed by carnal intercourse, did not become the law of this State by force of our adoption of the common law of England, for it was not a part of that common law. Should it be said that this course of reasoning would repudiate marriages *per verba de præsenti* without solemnization, I answer that the validity of such marriages is firmly established by judicial decisions in this State, which we are not at this day at liberty to question."

9. *Maryland.*—The only case to be found in the Maryland Reports touching the requisites of a marriage contract, is Cheseldine *v.* Brewer, decided in the Provincial Court in 1739.[5] The action was

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[1] See, also, Jenkins *v.* Bisbee, 1 Edw. Ch. 377; Hicks *v.* Cochran, 4 Ibid. 107.

[2] Jacques *v.* The Public Adm., 1 Bradf. Sur. R. 499.

[3] Turpin *v.* The Public Adm., 2 Ibid. 424; see, also, Cunningham *v.* Burdell, 4 Ibid. 343.

[4] Cheney *v.* Arnold, 15 N. Y. Rep. (1 Smith,) 345.

[5] Cheseldine *v.* Brewer, 1 Harris & M'H. 152.

ejectment, and upon the trial in the court below, the plaintiff, to prove that he was the legitimate son and heir of Kenelm Cheseldine, who died seized of the land in question, introduced evidence showing that said Kenelm, his reputed father, cohabited with Mary Sheppard, his mother, from the year 1712 to the time of the death of the said Kenelm, which occurred in 1717; and that during that time the said Kenelm and Mary had often declared that they were married; that he treated her as his wife, except at some particular times, when intoxicated or in a passion; that the plaintiff was born after the cohabitation commenced, and that the said Kenelm owned him for his son. The report of the case then proceeds to show that "the defendant prayed the justices to declare to the jury that the evidence was not sufficient to prove the lessor of the plaintiff to be the legitimate son of Kenelm Cheseldine, his supposed father, as no actual marriage was proved. But the justices directed the jury that if they found the said Kenelm and Mary had consented and agreed to be man and wife, and had cohabited and copulated as such before the birth of the lessor of the plaintiff, that they should render their verdict for the plaintiff. To this direction of the court the defendant excepted. And this court affirmed the judgment." The opinion of the court not being given in extenso, it cannot be ascertained with certainty upon what ground the decision was placed. There certainly was no necessity for express proof of an actual marriage, as claimed by defendant's counsel; and from the facts proved, the jury would clearly have been justified in finding that an actual marriage had taken place. The court below, however, do not appear to have noticed this phase of the case, but simply instructed the jury that a marriage *in præsenti* was sufficient, and invested the issue of such marriage with all the rights of legitimacy.

10. *New Jersey.*—Pearson *v.* Howey[1] was a proceeding for dower. The question was whether a justice of the peace might solemnize a marriage out of the county for which he was commissioned, and the point was decided in the affirmative. But Mr. Justice Ford also maintained the validity of the marriage as a contract *de præsenti*. "I consider it to have been long and fully settled," he said, "that such is a valid marriage, even if William Harrison, Esq. had not been a justice of the peace. It is a maxim of the common law, as ancient as the law itself, that '*consensus non concubitus, facit nup-*

[1] Pearson *v.* Howey, 6 Halst. 12; see pp. 18–21.

tias;' it is the contract makes the marriage. Such also has ever been the law or maxim of the Church in all ages, as well as of the common law." He reviewed some of the old English cases; noticed the New York case of Fenton *v.* Reed, and after expressing the opinion that the legislature had not changed the common law, added: "Courts of justice are not authorized to alter the law without legislative authority in any case, and most assuredly not in a case of such universal importance as that of marriage."

11. *Pennsylvania.*—Hantz *v.* Sealy[1] was an action of assumpsit brought to recover the amount of the personal estate of Henry Sealy, late husband of the plaintiff, bequeathed to her by his will. Among the defences interposed was one alleging the plaintiff to be the wife of the defendant. In support of this defence it was proved that a marriage took place between the parties before a clergyman in January, 1799; that they had given receipts in the name of Jacob and Mary Hantz; that they cohabited as husband and wife; had children, and had executed deeds for land in which she was styled his wife. But it appeared that at the time of this marriage the defendant had another wife living, from whom he had separated, effectually, as he supposed, but without any legal divorce. A divorce was afterwards obtained, and Hantz and Mrs. Sealy having come to Mr. Watts, their counsel, on business, were advised by him to celebrate a new marriage. Hantz then said, "I take you (the plaintiff) for my wife;" and the plaintiff being told that if she would say the same it would be a complete marriage, replied, "to be sure he is my husband good enough." Mr. Watts advised them to repeat the marriage in a solemn manner before a clergyman, and he thought they went out for that purpose, but it was never done. The jury were instructed "that as to the cohabitation and acts of the parties, they did not amount to a marriage, but were facts from which a marriage might be inferred. They were circumstances on which to ground a presumption of marriage, and might be met with circumstances showing that they were founded on some fact unconnected with marriage. As for instance, if the cohabitation was merely the consequence of the marriage before the clergyman, which was clearly void, and if the acknowledgments referred entirely to the fact of that marriage, then they could not be considered as referring to any other marriage, nor have any weight in proving the marriage contended for. These

[1] Hantz *v.* Sealy, 6 Binn. 405.

facts would entirely destroy the presumption of a legal marriage that would otherwise arise from the cohabitation and acknowledgments; and the jury were to decide upon them. As to the marriage before Mr. Watts, there was no doubt that marriage in Pennsylvania was so far a civil contract as to be governed by the municipal laws of the State, viz., the statute and common law, as in England. There was no particular form of ceremony established by the law of Pennsylvania, which was to govern in all cases; but marriage was a very important and solemn institution, and the manner in which it was to be contracted ought to be suitable to the nature and importance of the engagement. It was not absolutely necessary to be done before a clergyman, or a magistrate, but it ought to be entered into with consideration and deliberate assent, and ought to be done formally and solemnly. The court did not think it necessary to lay down any rule as to what form and ceremonies might be requisite to form a marriage; but they were decidedly of opinion that the facts which occurred before Mr. Watts did not constitute a legal marriage." In the Supreme Court this charge was approved, the court holding that, keeping in view the former adulterous connection, the circumstances proved were too slight and equivocal to make out a legal marriage.

In Chambers *v.* Dickson,[1] which was a proceeding for dower, it was held that cohabitation and reputation, especially if of an ancient date, is good evidence to be left to a jury to prove marriage. In the course of his opinion, Tilghman, Ch. J., said: "Our marriages are celebrated sometimes by clergymen, sometimes by justices of the peace, and sometimes before witnesses without the intervention of justices or clergymen."[2] These cases, therefore, may be regarded as establishing the validity of marriages *in præsenti* in Pennsylvania.

12. *California.*—In this State a private contract of marriage is held valid. This point was ruled in Graham *v.* Bennet,[3] the parties in that case having signed a written contract of marriage in the presence of witnesses. "Marriage," the court said, "is a civil contract, and no form is necessary for its solemnization. Where parties are able to contract, an open avowal of the intention, and assumption of the relative duties which it imposes, are sufficient to render it valid and

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[1] Chambers *v.* Dickson, 2 S. & R. 477.

[2] See, also, Rodebaugh *v.* Sauks, 2 Watts, 1.

[3] Graham *v.* Bennet, 2 Cal. 503.

binding." But it is necessary that there should be an actual contract of *present* marriage, and an honest purpose to assume at once the duties of that relation. Therefore, where the plaintiff averred in her complaint, in a suit brought for her distributive share of the estate of an alleged deceased husband, that the deceased made proposals of marriage to her which she accepted, and consented to live with him *as* his true and lawful wife, and that, in accordance with his wishes, she thereupon lived and cohabited with him *as* his wife, always conducting herself *as* a true, faithful, and affectionate wife should do, it was held, on demurrer to the complaint, that these were insufficient averments of the existence of a marriage; that they amounted only to *prima facie* evidence of marriage; an agreement to live together *as* husband and wife, not of itself amounting to a contract of marriage, but being consistent with the idea that the arrangement was to be of a temporary character only.[1]

13. *Ohio.*—In this State it has recently been determined that a contract of marriage *per verba de præsenti*, made in good faith, constitutes a valid marriage. Upon a trial for bigamy, a question was raised whether the person who solemnized the second marriage had authority to perform that ceremony within the State. The court which tried the case instructed the jury "that it made no difference whether the person so solemnizing said marriage was authorized to do so or not; that if solemnized by whomsoever, it was a marriage if followed by cohabitation as husband and wife." The defendant was convicted and sentenced, and on error the Supreme Court affirmed the judgment. The decision in The Queen *v.* Millis was adverted to and considered at length, but the reasoning upon which the marriage in that case was held invalid, was deemed inapplicable under the legislation of Ohio. The court, however, hesitated to adopt, without qualification, the general proposition, that a contract *per verba de præsenti* constitutes a good marriage. "The requisites to constitute a valid marriage," they said, "independent of any positive law, have been stated in many authorities, but it must still be a question on the facts of the particular case. It may be that in most cases a ready answer may be given upon any statement of the facts, whether there was a marriage or not, and those who were present at the time the consent was given, and cognizant of the conduct toward each other, of the parties thereafter, could very rarely fail in forming a

[1] Letters *v.* Cady, 10 Cal. 533.

correct conclusion. But when it is stated, in general language, that a contract *per verba de præsenti* constitutes a valid marriage, the mind feels some hesitation in assenting to the naked proposition, and a desire, in language attributed to Lord Eldon, to have it clothed in circumstances. . . . . To constitute a marriage, it must appear from the acts of the parties, for words on such an occasion are acts forming part of the *res gestæ*, that they did, in the homely but strong language of our statute, 'join together as husband and wife.' How this shall appear, in any case in which it is alleged that persons have joined together as husband and wife, without pursuing the mode prescribed by the statute, must depend on the circumstances. There must be a contract of present marriage—it must appear that the woman was taken as a wife, and that the man was taken as a husband. The circumstances of publicity in entering into the contract, and of cohabitation thereafter as husband and wife, are most important to show the intent with which any words were used, and without such circumstances, under the manifest policy of our laws on the subject, and the habits and feelings of our people, an intent to form the honorable relation of marriage could not properly be found."[1]

14. *Louisiana.*—In this State the rule as it existed on the continent, prior to the Council of Trent, is adopted by the courts. In the case of Holmes *v.* Holmes,[2] determined in 1834, it was decided that by the law of Louisiana marriage is regarded in no other light than as a civil contract, depending essentially on the free consent of parties capable by law of contracting. "Our code," the court added, "does not declare null a marriage not preceded by a license, and not evidenced by an act signed by a certain number of witnesses and the parties; nor does it make such an act exclusive evidence of marriage." In the more recent case of Patton *v.* Philadelphia,[3] the subject was very thoroughly discussed, and the doctrine of the old canon law firmly established in that State. The facts of that case bearing upon this question were as follows: In 1799 one Abraham Morehouse, by an act passed before the commandant of Fort Miro, in the District of Ouachita, acting as a notary public, agreed to take as his wife Elénore Hook. The commandant stated in the act that it was passed before him in conformity with a custom sanctioned by the Government, on account of the want of spiritual assistance,

[1] Carmichael *v.* The State, 12 Ohio St. 553, 559.

[2] Holmes *v.* Holmes, 6 La. 463.

[3] Patton *v.* Philadelphia, 1 La. An. 98.

and that the marriage was to be solemnized before the church on the first opportunity. Abraham Morehouse, in the act, declared himself to be the widower of Abigail Young, and stipulated with Elénore Hook and her curator that the rights of the children of the second and of the previous marriage should be the same, whether those born of the second marriage were born before or after its solemnization before the church, and whether or not the solemnization took place. The daughter of the commandant testified that there was no priest at that time in the District of Ouachita; that she was present at the celebration of the marriage before her father; that the usual formalities were complied with, and that immediate cohabitation followed, as was then the custom of the colony. The marriage was held valid. "We conclude, therefore," the court said, after stating the doctrine as recognized anterior to the Council of Trent, and the action of the kings of Spain with reference to the proceedings of that body, "that after the adoption of the Council of Trent, the kings of Spain retained the power to suspend the operation of that portion of it which relates to the celebration of marriages in the remote settlements of new colonies yet unprovided with churches or priests. In proof that this power was exercised in Louisiana, we have the historical facts that marriages *per verba de præsenti* were usual in the remote parts of the colony, and that one of the Spanish governors was married thus..... It matters not, therefore, whether it be true as stated by one of the witnesses, that Abraham Morehouse refused, subsequently, to solemnize his marriage before the priest. That marriage was valid without the solemnization." The doctrine of this case, "so far as it declares that the regulations of the Council of Trent in regard to marriages were never extended to the colony of Louisiana by the king of Spain," was afterwards affirmed in the same court.[1]

15. *Kentucky.*—The case of Dumaresly *v.* Fishly,[2] decided in Kentucky, is often referred to as holding that a marriage *per verba de præsenti* is good in law. A critical examination of the opinion of the court, however, and of the facts upon which it is predicated, will show that the case does not go to the full extent sometimes claimed for it. The action was to recover damages for slanderous words alleged to have been spoken of the plaintiff by the defendant. The defendant pleaded that the plaintiff, at the commencement of

[1] Succession of Prevost, 4 La. An. 347; see, also, Hallett *v.* Collins, 10 How. U. S. R. 174; post, § 34.

[2] Dumaresly *v.* Fishly, 3 A. K. Marsh. 368.

the suit, was his lawful wife, and upon this plea issue was joined. It appeared from the evidence that some time prior to the commencement of the suit, a license for the marriage of the plaintiff and defendant had been issued by the clerk of the county court of Jefferson County, Kentucky, with the consent of the plaintiff's father, and that the marriage ceremony was performed at the house of her father, in Jeffersonville, in the State of Indiana, where she resided, by a priest of the Roman Catholic religion, who had previously obtained from the county court of Nelson County, Kentucky, where he resided, a testimonial authorizing him to celebrate the rites of matrimony; but that the defendant declined cohabiting with the plaintiff, and that the marriage had not been consummated. No license had been issued for the marriage, as required by the laws of Indiana. The case, therefore, presented directly the question as to the validity of a contract *de præsenti*, for the clergyman who solemnized the marriage, though licensed by a Kentucky court to perform that rite, had manifestly no power or authority to exercise his clerical functions, in the solemnization of marriages, in the State of Indiana. It was the same, therefore, as if the marriage had been contracted in the presence and with the aid of a private individual, not clothed with ecclesiastical or legal authority. The court sustained the defence, upon the ground that the contract amounted to a marriage *de facto*, holding that such a marriage was sufficient in all personal matters and causes. But they were particularly careful to note the distinction between a marriage in fact and a marriage in law, as understood by them, showing that by the common law, while the former was, as a general rule, good in personal actions, it was essential that, in certain real actions, a marriage *de jure* should be made out. Justice Mills dissented from the majority of the court, holding that inasmuch as the defendant had been the first to declare the marriage void, and had refused to cohabit with the plaintiff, it did not lie in his mouth to insist upon its validity, in an action afterwards brought by her to protect her reputation against his assaults. He contended, moreover, that if a marriage was not good as such for all purposes, it was not good for any purpose whatever; in fact, that it was no marriage at all. And he suggested that it would be unjust to treat the personal rights and identity of the woman as in a measure merged by a supposed marriage *de facto*, and intimate at the same time a disposition to withhold from her valuable marital rights, particularly those of a widow, in the real estate of her alleged husband,

in the event of her being the survivor. This criticism would seem to be worthy of especial consideration, and the anomaly suggested will be further noticed in a subsequent chapter.[1]

16. In a more recent case, the Kentucky court unhesitatingly indorsed the ruling in Fenton *v.* Reed,[2] upon one of the material propositions there laid down, and gave to the widow of a man who had a former wife living at the time of the marriage, dower in his estate, upon a presumed resolemnization of the contract after the death of the first wife. The claimant for dower had contracted the marriage, and resided with the supposed husband down to the time of his death, a period of about twenty-one years, in utter ignorance of the pre-existing relation, and in the honest belief that she was the lawful wife of the deceased. They had continued to reside together as husband and wife after the death of the first wife, recognizing that relation as subsisting between them, and reputed as such in the community. They had also raised a family of children. "These facts," said the court, "authorize, we think, the presumption of a marriage after the death of the first wife, and justify the conclusion that the defendant was the lawful wife of Donnelly at his death."[3] It will be perceived that in this case no question arose, nor was considered, as to the sufficiency of a marriage *de præsenti*, the conclusion of the court being placed upon a supposed actual marriage without reference to the form of its solemnization.

17. *Alabama.*—In The State *v.* Murphy,[4] certain parties were indicted for being engaged in a conspiracy to seduce an unmarried female. One of them proposed marriage, and was accepted; he afterwards produced a forged license, representing it to be genuine; he also fraudulently represented a coconspirator to be a person having authority to solemnize marriages, and the ceremony was performed by the latter, the woman acting in good faith, and relying on the truth of the statements thus made to her. The court intimated, but did not decide the point, that under these circumstances the woman might treat the marriage as binding in law. "We have said that the guilt of the conspirators can not be affected by the validity of the marriage between Miss Buckalow and Watts, and perhaps should be going beyond what strict duty requires, were we to

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[1] Chap. 6. [2] Fenton *v.* Reed, 4 John. 52; ante, § 8.

[3] Donnelly *v.* Donnelly, 8 B. Mon. 113.

[4] The State *v.* Murphy, 6 Ala. N. S. 765; 2 West. Law Journ. 192.

consider whether what transpired established the relation of husband and wife. It may, however, be remarked, that the solemnization of the contract of espousal is *non juris naturalis aut divini*, but it is *juris positivi*. Marriage, then, being a civil contract, may it not be consummated by persons of competent age, &c., *per verba de præsenti*, where there is no statute which impliedly or expressly declares it void if not solemnized according to express forms? Are not our statutes in respect to marriage directory rather to the officer who is authorized to issue a license, and the functionaries who are to celebrate it, than to the parties who enter into this relation? If this be so, could Watts be heard to object that he had not taken Miss Buckalow for his wife, if they both, in answer to the usual questions, assented to a union? Whether she might not, if overreached by misrepresentation and fraud, repudiate him, is another question. Without undertaking to consider the questions we have stated, we have thought it proper to propose them, and cite the authorities by which they may be answered, that the parties who were the principal persons in the drama may be brought understandingly to inquire in what relation they stand to each other."

18. *Texas.*—In this State a contract of marriage was presumed under the following circumstances: A marriage took place in Ohio in 1809; the parties separated in 1818; the wife shortly afterwards disappeared, and there was no trace of her for four years, at the expiration of which time the husband emigrated to Texas. In 1822 the husband, and a woman not his wife, presented themselves in one of the counties of that State, represented themselves to be husband and wife, and were registered as such. They cohabited together until 1827, when the man died. Children were born of the connection, and in the neighborhood where the parties resided they were reputed husband and wife. It was held that under these circumstances the death of the first wife would be presumed, and thus all legal impediment to a second marriage be removed. The court further held that they would presume a second marriage to have been entered into, even if the connection were shown to have been illicit and criminal in the beginning. "Admitting that their original intercourse was illicit with the knowledge of both parties," the court observed, "it would be urging the presumption to an unreasonable extent to suppose that the unlawful character of the connection was unsusceptible of a change, and that when all legal disabilities had ceased to operate, they would voluntarily decline all the honors,

advantages, and rights of matrimony, and prefer an association disgraceful to both parties, but peculiarly degrading to the female, and which inflicted upon their innocent offspring the stigma and penalties of illegitimacy."[1]

We come now to the consideration of the cases in which the legality and validity of marriages *de præsenti* are doubted or denied.

19. *Massachusetts.*—"A marriage in this State," says Mr. Dane, "does not depend on the canon law, but has ever been regulated by statutes, passed by the Colony, Province, and State legislatures. Hence these statutes must be considered as the foundations on which our marriages rest."[2] The decided cases in Massachusetts are in accordance with the doctrine here expressed. Thus, in Mangue *v.* Mangue,[3] which was a proceeding for divorce, the following certificate was offered in evidence for the purpose of proving the marriage of the parties: "Be it remembered that on the 17th day of —— came before me, J. B. one of the justices of the peace for the county of ——, Henry Mangue and Nancy Neale, when the said Henry Mangue took the said Nancy Neale by her right hand and voluntarily said, 'I take this Nancy Neale to be my wedded wife, and I promise to do for her, and conduct towards her in all respects according to the rules of the marriage covenant so long as it shall please God to continue us both in this life,'—and then let go her right hand, when the said Nancy Neale immediately took the said Henry Mangue by his right hand, and voluntarily said, (repeating the words before used, *mutatis mutandis,*) of which proceedings as aforesaid, the said Henry Mangue and Nancy Neale required of me, the said justice, to make record, and called upon one S. N. and B. S. then present to bear witness to the whole of their proceedings.—Before me, J. B. justice of the peace." This instrument was also attested by the witnesses named. It appeared, further, that each party signed, and left in the hands of the justice a writing, by which they acknowledged the transaction recited in the certificate to have taken place. The court refused to regard this as a valid marriage. Thacher, J.: "Here is no evidence of a marriage—no such evidence as is known in law;—the parties agreed to come together, and they may now agree to separate." Sewall, J.: "It is apparent, from the certificate which has been shown to the court, that the justice did not act officially—

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[1] Yates *v.* Houston, 3 Texas, 433.

[2] 2 Dane, 291.

[3] Mangue *v.* Mangue, 1 Mass. 240.

he has not certified that the parties were legally joined in marriage by him—he was merely a private witness of the transaction like the rest of the witnesses present. I do not undertake to say that this was not a marriage as to *civil* purposes, nor how it might operate as to civil contracts, but as to the case before the court there must have been such a marriage as is pointed out by the acts of the legislature, (statute 1785, c. 69,) for such only are we authorized to dissolve." Sedgwick, J.: "I have no doubts upon the question before the court. But I intentionally avoid giving any opinion as to the effect of the transactions as relative to civil contracts—nor will I say what effect they would have in exculpation of the parties upon prosecutions against them for lewdness, cohabitation, adultery, &c. *This* court is authorized to dissolve marriages for the cause alleged in the libel —but they must be such marriages as the law considers to be, to all intents and purposes, legal marriages. Whether, therefore, there has or has not been what the law might, to certain purposes, consider as a marriage in fact, I am clear that there is not evidence of such a marriage as the act of the legislature considers as a marriage to *all* intents and purposes legal, and of such, only, can we take notice."

20. In Milford *v.* Worcester,[1] also, it was held that under their statute the intervention of a justice of the peace or an ordained minister was essential to a valid marriage. The marriage declared null by the court in that case was a contract *de præsenti*, mutually entered into by the parties in the presence of a justice of the peace and of sundry witnesses after the officer had refused to assist in the ceremonial, and on the faith of which the contracting parties had cohabited as husband and wife for many years, and had reared a family of children. "No person," said the court, in announcing their judgment, "can lawfully solemnize marriages but a justice of the peace, or an ordained minister. A marriage merely the effect of a mutual engagement between the parties, or solemnized by any one not a justice of the peace or an ordained minister, is not a legal marriage, entitled to the incidents of a marriage duly solemnized. The woman, when a widow, can not claim dower, nor the issue seizin by descent." This decision, pronounced in 1810, appears to stand unquestioned in Massachusetts to the present day.[2]

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[1] Milford *v.* Worcester, 7 Mass. 48.

[2] See, also, the case against Norcross, 9 Mass. 492.

21. *Maine.*—In Maine, likewise, the validity of marriages *de præsenti* is denied by the courts. In Brunswick *v.* Litchfield,[1] it was held that a marriage solemnized by a minister of an unincorporated church or society of Free-will Baptists, licensed and ordained according to the rules of that communion, and claiming and exercising the right to join persons in marriage, was void. It was shown that the parties were competent to contract marriage; that their intentions of marriage had been duly entered and published, and that they were members of the society above mentioned. The decision was placed upon the ground that the party officiating was not authorized by the laws of the State to solemnize marriages, and the court cited and relied upon the case referred to in the preceding section, of Milford *v.* Worcester.

22. Ligonia *v.* Buxton[2] is to the same effect. In that case the marriage had been solemnized by a minister ordained over an unincorporated religious society composed of members belonging to different towns, and the marriage was held void—1. Because he was not a stated and ordained minister of the Gospel within the meaning of the statute in force at the time. 2. Because the marriage was solemnized at the house of the minister, neither of the parties residing in that town at the time, which was contrary to the directions of the statute.

23. In Cram *v.* Burnham,[3] a marriage had been entered into while the husband had a former wife living, of which fact the second wife was cognizant at the time. They cohabited together many years, during which period the wife of the first marriage deceased. After her death the husband and second wife continued to reside together as before until the death of the latter. The court held that the parties were not to be regarded as husband and wife. The case of Fenton *v.* Reed[4] was cited in the argument, and adverted to by the court, but it was distinguished from the one at bar upon the ground that in the former the connection was innocent in its inception, and under all the circumstances, a second marriage, subsequent to the death of the first husband, might fairly be presumed; while in the latter no such presumption could arise. But the doctrine broadly laid down in Fenton *v.* Reed was questioned by the court. "The court in New

[1] Brunswick *v.* Litchfield, 2 Greenl. 32.
[2] Ligonia *v.* Buxton, 2 Greenl. 102.
[3] Cram *v.* Burnham, 5 Greenl. 213.
[4] Fenton *v.* Reed, 4 John. 52; ante, § 8.

York," they observed, "say that a contract of marriage made *per verba de præsenti*, amounts to an actual marriage, without any formal solemnization. They cite the case of M'Adam *v.* Walker, 1 Dow. 148, which was an appeal from the Court of Sessions in Scotland, where Lord Eldon states the law in the same manner, which he says is warranted by the law of Scotland and by the canon law. It might deserve great consideration whether a doctrine thus broad would be sanctioned in this State."

24. Damon's case[1] was a prosecution for bigamy. The court held that in order to sustain the indictment "there must be evidence of a marriage in fact, *by a person legally authorized*, and between persons legally competent to contract." And in The State *v.* Hodgskins[2] the court adhered, in very positive terms, to the same rule. It was proven by witnesses who were present at the time, that a marriage contract had been solemnly entered into; that the ceremony was performed by an individual assuming to have legal authority to act, and that the contracting parties had resided together many years, and were the parents of a large family of children, issue of the marriage. But the court held this evidence insufficient, and required proof that the person who performed the ceremony was clothed with the requisite authority for that purpose, thus negativing in the strongest manner the idea that a marriage *per verba de præsenti* is good in that State.

25. *New Hampshire.*—The opinion of the Superior Court of Judicature of New Hampshire, in the case of Londonderry *v.* Chester,[3] is one of the most complete and thorough expositions of the marriage law to be found in the American reports. The particular point arising in the case was whether the clergyman who performed the marriage ceremony there drawn in question, was an ordained minister qualified to solemnize marriages, within the act of 1791; but the consideration of this question led to the discussion by the court of the whole subject of the marriage contract. "Both Bracton, b. 1, ch. 5, and Plowden, 445," said the judge who delivered the opinion, "agree that the institution of marriage is derived from the law of nations, and that marriages may be formed by mutual agreement; *fit per mutuam utriusque voluntatem quæ matrimonium appellatur.*

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[1] Damon's case, 6 Greenl. 148.

[2] The State *v.* Hodgskins, 19 Maine R. 155.

[3] Londonderry *v.* Chester, 2 N. H. 268.

It is a mere *civil* contract. . . . . The form of the contract of marriage, as a mere civil transaction, is well enough established. Thus, if it be *per verba in futuro*, the contract is executory; and if not afterwards executed, an action lies for damages alone. Though formerly this kind of contract was specifically enforced by the ecclesiastical court, and its existence was considered a good cause of divorce. But if the contract be *per verba de præsenti*, the marriage is complete, and if the parties, being in other respects competent to contract, and not being influenced by fraud or force, employ such words, they become, by the operation of the contract alone, husband and wife, and are liable to the duties of their new relation."

26. In Clark *v.* Clark,[1] the court, to some extent, indorsed this view of the law, citing with apparent approval the case of Londonderry *v.* Chester; but in Dunbarton *v.* Franklin,[2] determined as late as 1848, the court indicate a strong disposition to adopt an entirely different rule, rejecting the conclusions of Judge Woodbury as stated in 2d New Hampshire, so far as they recognize the validity of contracts *de præsenti*, and substantially following the lead of the court in 7th Massachusetts. There was no evidence of an actual *formal* solemnization of the marriage, but there was testimony that the parties had lived together for many years, acknowledging each other as husband and wife, and were generally reputed to be married; there was proof, also, that they had entered into a private contract of marriage, and lived together in accordance with that contract. The court held distinctly and explicitly that while this evidence was sufficient to justify a jury in presuming that a marriage in fact had taken place in accordance with the prescribed formalities of the law, yet that it was error in the court below to instruct the jury that a contract of marriage entered into by the parties themselves, followed by cohabitation, was sufficient *per se* to constitute a valid marriage. The remarks of Mr. Justice Woodbury, in the case of Londonderry *v.* Chester, it was said, although relevant to the general question, were not called for by the particular matter to be decided by the court. And the court further added, in conclusion: "We imagine that it has never been understood in this State that cohabitation without more, in pursuance of a contract of marriage, constitutes a marriage. Such a doctrine would be productive of the worst conse-

[1] Clark *v.* Clark, 10 N. H. 380.

[2] Dunbarton *v.* Franklin, 19 N. H. 257.

quences to the peace and morals of society. Undoubtedly, where there is proof of a contract of marriage, and cohabitation in pursuance of it, the jury may believe that the parties were actually married; but the marriage is a fact to be found by the jury, and the other circumstances are competent evidence for their consideration, but they do not of themselves constitute a marriage, as must be the case if from such evidence the jury are bound to find that the parties are actually married."

27. In Keyes *v.* Keyes,[1] which was a proceeding to obtain a decree of nullity of marriage on the ground of the alleged insanity of one of the parties at the time it was entered into, the court remarked that "in modern times the contract of marriage has been very generally and very properly regarded as a civil contract requiring the assent of the parties;" but nothing was said impugning in the least degree the decision in Dunbarton *v.* Franklin. No case is found in the New Hampshire Reports indicating a departure from the rule as applied in the last-mentioned case; and inasmuch as the case of Londonderry *v.* Chester did not present directly for adjudication the question of the validity of marriages *de præsenti*, and that question fairly and necessarily arose in Dunbarton *v.* Franklin, and was determined adversely to their sufficiency, it would seem that, in New Hampshire, marriages not solemnized by the proper authority are to be treated as ineffectual to confer the civil rights or to create the liabilities attaching to the regular marriage.

28. *Tennessee.*—In Bashaw *v.* The State,[2] which was a prosecution for bigamy, it was held that to constitute a valid marriage under the laws of Tennessee, two things are essentially necessary: 1. A proper and lawful authority to solemnize the marriage. 2. A performance of the marriage ceremony by a person duly qualified by the acts of Assembly. A marriage solemnized in one county by a justice of the peace of another county, though formal and legal in other respects, was pronounced invalid. In a subsequent case the same doctrine was affirmed. On a presentment for open and notorious lewdness, it was held to be no defence that the parties had verbally contracted marriage, and lived together as husband and wife according to the common law. Upon this point the language of the court was clear and emphatic. "The contract of marriage," they said, "is a civil contract, dependent respectively upon the law of

[1] Keyes *v.* Keyes, 2 Foster's N. H. Rep. 553.

[2] Bashaw *v.* The State, 1 Yerg. 177.

each and every country or sovereignty; and its constitution directed and controlled by the municipal regulations of such country or sovereignty prescribing its rites and forms of solemnization. The common law form of solemnization by verbal contract expressing the assent of the mind, and living together, which is presumed by the argument to have been brought by our ancestors along with them upon their emigration from England, and forming originally a part of their colonization code of law, can not now be considered as being of any force and validity after the colonial government took up the subject of the marriage contract and legislated upon it, making enactments, and prescribing rules and regulations for its solemnization altogether inconsistent with and repugnant to the common law in this respect. Accordingly, since the year 1741, at the least, the common law mode of constituting a legal marriage is of no validity here."[1]

29. *Vermont.*—The Supreme Court of this State, in a very early case, went to the full extent of sustaining marriages *per verba de præsenti.*[2] Certain parties, resident in Vermont, had gone into Lower Canada, and on the 7th day of September, 1807, before a justice of the peace of the Province, covenanted and agreed with each other to be husband and wife. No clergyman was present, and the justice of the peace took no part in the ceremony except to make a memorandum of the facts as they occurred, he not being authorized by law to solemnize marriages. No other ceremony of marriage was had between them at any time, but they continued to cohabit as husband and wife, and there were several children, issue of the marriage. Unless, therefore, the marriage was good as a contract *per verba de præsenti*, it was of no validity whatever. After full consideration of the question and examination of the authorities, the court sustained the marriage. In the course of their opinion the court said: "It has been contended by the appellees, that the proceeding before the justice of the peace in the Province did constitute a marriage *per verba de præsenti* between Harriman and Lydia Page. Of that there is little doubt. It was declared by C. J. Holt, in Jesson *v.* Collins, 2 Salk. 437, that a contract *per verba de præsenti* was a marriage, namely, I marry you—you and I are man and wife. And, again, he holds similar language in Wigmore's case, p. 438. And in Fenton *v.* Reed it was determined that a contract of marriage made *per verba de præsenti* amounts to an actual marriage, and is

[1] Grisham *v.* The State, 2 Yerg. 589.

[2] 2 Verm. R. 151.

as valid as if made in *facie ecclesiæ*. And, in Reed *v.* Posser, Lord Kenyon says, 'that an agreement of marriage between the parties, *per verba de præsenti*, was *ipsum matrimonium*.' And as neither our statute, nor that of the 26 Geo. II.,[1] declares marriages void which are not consummated according to the provisions of them, no sound reason can be offered why the covenants and agreements of marriage between Harriman and Lydia Page, entered into before the justice, *per verba de præsenti*, followed by cohabitation uninterrupted to the time of the order of removal, should not be valid to every intent as though made before the altar, especially as it is viewed both in this State and in England in no other light than as a civil contract."[2]

30. In the more recent case of Northfield *v.* Plymouth,[3] however, the court entertained serious doubts of the correctness of the doctrine above enunciated, and Redfield, J., who delivered the opinion, regarded it as directly in conflict with a proper construction of their statutes upon the subject. A marriage *de præsenti* had been contracted at a time when the woman had a former husband living. The parties, with full knowledge that the first husband was living, had continued their connection until after his decease, and down to the date of the death of the second husband. The court pronounced against the proposition sought to be established, that after the death of the first husband a new contract *de præsenti* was to be presumed, and adopted, substantially, the views of the Maine court in Cram *v.* Burnham.[4] In respect to the New York case of Fenton *v.* Reed, the judge delivering the opinion, after remarking that in that case stress was laid upon the fact "that a marriage *per verba de præsenti* is valid in that State, and also at common law, if followed by cohabitation," added: "This, I think, could hardly be regarded as law in this State without virtually repealing our statute upon that subject. It certainly has never been so regarded under the English statute of 26 Geo. II. and 4 Geo. IV. ch. 76; and I see no reason why it should be here, when it is clearly a dispensation with all the requisitions of the statute upon the subject." It will be seen that in these remarks the learned judge simply expresses his individual convictions upon the question, without assuming to decide it, for the reason, no doubt,

[1] The learned judge was certainly in error as to the provisions of the statute of Geo. II.

[2] Newbury *v.* Brunswick, 2 Verm. 151; see, also, The State *v.* Rood, 12 Verm. 396.

[3] Northfield *v.* Plymouth, 20 Verm. 582.

[4] Cram *v.* Burnham, 5 Greenl. 218; ante, § 33.

that its determination was not called for in the case; but in view of the opinion thus deliberately expressed by one of the leading jurists of the State, it may well be doubted whether marriages *de præsenti* will be sustained, when the question shall hereafter be presented to the courts of Vermont for express adjudication.

31. *Mississippi.*—No case involving the direct question of the requisites of a valid marriage has been determined in Mississippi; but the language of the court, in the case of Stevenson *v.* McReary,[1] appears to be against the sufficiency of marriages entered into by private contract. "The last charge refused," they say, "is, that cohabitation and acknowledgment are legal evidence of marriage, and if the jury believe from the evidence that Stephen and Mary Stevenson cohabited and held themselves out as husband and wife, and raised and provided for a large family of children, which they acknowledged and held out to the world as their children, they must find for the plaintiffs. This was asking the court to weigh the evidence. The court might have charged the jury, as it afterwards did, that such circumstances would justify them in presuming a marriage, but such circumstances could not, under all circumstances, justify a verdict for the plaintiff."

32. *North Carolina.*—In North Carolina, in the case of The State *v.* Samuel,[2] the court pronounced against the validity of marriages entered into by private contract merely. "We do not agree," they said, "that persons *sui juris* are legally married merely in virtue of their own consent, however explicitly expressed in terms of immediate agreement, unless it be so expressed in presence of those persons who are designated by law to be witnesses thereto. It is unnecessary to state at large the reasons on which our opinion on this point rests; because no person can reflect on the subject without perceiving that such should be the law, nor read our statutes without likewise perceiving that such is intended by the legislature to be the law."

The Rule in the Supreme Court of the United States.

33. The case of Jewell *v.* Jewell,[3] brought into the Supreme Court of the United States, upon a writ of error to the Circuit Court of South Carolina, among others, presented the question whether marriages *per verba de præsenti* and *per verba de futuro cum copula*

[1] Stevenson *v.* McReary, 12 S. & M. 9.

[2] The State *v.* Samuel, 2 Dev. & Bat. L. Rep. 177, 180.

[3] Jewell *v.* Jewell, 1 How. U. S. 219.

are good. The Circuit Court had held that both these classes of marriage are valid, and equally binding (the parties being competent as to age and consent) as if made in *facie ecclesiæ*. Upon this point the judges of the Supreme Court were equally divided, and consequently no opinion in relation to it was expressed by either of them.

34. The case of Hallett *v.* Collins,[1] appealed to the Supreme Court, from the Circuit Court of the United States for the Southern District of Alabama, also involved this question. The statement of the case shows that Joseph Collins resided in the country south of the thirty-first degree of north latitude, between the Iberville and Perdido, and died there about the year 1811 or 1812, while that country was still in the actual possession of the Spanish government. In the year 1805 he resided in Pascagoula. Elizabeth Wilson resided in the same place, and in the family of Dr. White, who was a syndic or chief public officer in that place. A contract of marriage was entered into by Joseph Collins and Elizabeth Wilson before Dr. White, who performed the marriage ceremony. The parties continued to live together as husband and wife till the death of Collins. A question was made whether the marriage, having been contracted in a Spanish colony, in the presence of a civil magistrate, without the sanction of a priest, was a valid marriage. The Supreme Court, in their opinion in this case, declared it to be an established principle of the civil and canon law, antecedent to the Council of Trent, that a marriage might be validly contracted by mutual promises alone, or what were called *sponsalia de præsenti*, without the presence or benediction of a priest; that the decree of the Council of Trent, though adopted by the king of Spain in his European dominions, was not extended to the Spanish colonies, and that the marriage, therefore, was sufficient in law.[2] The court remarked that it had, of late years, been disputed in England, whether a marriage *de præsenti*, previous to the Marriage Act, was sufficient by the common law, adding, however, that it had never been doubted here; an observation, it would seem, in view of the equal division of the same court upon the identical question, in the case referred to in the preceding section, which should be taken with some degree of qualification.

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[1] Hallett *v.* Collins, 10 How. U. S. 174.

[2] See the views of the Supreme Court of Pennsylvania, sustaining a marriage celebrated before a justice of the peace, in a portion of the territory of Mississippi, while under the *de facto* government of Spain. Phillips *v.* Gregg, 10 Watts R. 158. See, also, ante, § 18.

CHAPTER V.

OF MARRIAGE PER VERBA DE FUTURO CUM COPULA.

§ 1, 2. Distinction between marriage *per verba de præsenti* and *per verba de futuro cum copula*.

§ 3–6. The doctrine in the United States.

7. Concluding observations.

1. In the case of a marriage *per verba de præsenti*, the parties are understood to deliberately accept the relation of husband and wife from the time of the contract; but a promise *per verba de futuro* looks to the future acts of the parties for its completion, and the marriage which it contemplates may never take place.[1] But where *copula* ensues upon the promise, and there are no circumstances to disconnect the cohabitation from the previous mutual engagement, the present consent essential to matrimony, according to some of the authorities, is supposed to be exchanged between the parties at the moment of the intercourse, and the marriage thus contracted and consummated is considered equivalent, in legal effect, to a contract *per verba de præsenti*.[2] The legal presumption thus made, though but slightly founded in nature or reality, is held to be abundantly recommended by its equity, and the just check which it imposes upon perfidy.[3]

2. The text-books, both English and American, lay down the rule as stated in the preceding section. And notwithstanding the many points of difference discussed in The Queen *v.* Millis,[4] it was agreed on all sides that espousals *per verba de futuro cum copula* have precisely the effect of espousals *per verba de præsenti*, the point in controversy being as to the true legal effect of marriages of the latter class. And Mr. Jacob, who has labored with more zeal, perhaps,

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[1] Shelf. Mar. and Div. 28.

[2] Macq. H. & W. 5, 6; Shelf. Mar. and Div. 26; Reid *v.* Laing, 1 Shaw Ap. Cas. 440; Stewart *v.* Menzies, 2 Rob. Ap. Cas. 547, 591; Lord Stowell, in Dalrymple *v.* Dalrymple, 2 Hag. Con. R. 66, 67; 4 Eng. Ec. 490–1; 1 Fras. Dom. Rel. 188.

[3] Macq. H. & W. 6.

[4] The Queen *v.* Millis, 10 Clark & Fin. 534; ante, ch. 3, § 15.

than any other writer in maintenance of the proposition that contracts *de præsenti* do not constitute complete marriage, admits that contracts *per verba de futuro*, when followed by carnal intercourse, are to be regarded as possessing the same legal efficacy as the former.[1] In Scotland the rule appears well established, not only upon the authority of text writers, but by express adjudication.[2] It should be noticed, however, that the law of Scotland upon this subject possesses one peculiarity, not found in the common law of England, designed for the protection of the male sex against the arts of designing and unscrupulous females. In all this class of cases, the contract or promise of marriage alleged to have been made anterior to the *copula*, must, by the Scottish law, be proved by the oath or written statement of the man, parol proof from other sources being rejected as inadmissible.[3]

3. In the United States the views of the text writers are marked with the same unanimity observable in England. Chancellor Kent states it as a clear and apparently undeniable proposition, that a promise of future marriage, given and accepted, if entered into by parties competent thereto, followed by *copula*, in the absence of all civil regulations to the contrary, makes a good marriage.[4] The text of Greenleaf, Bouvier, and Bishop is to the same effect.[5] At the same time it is worthy of note that no case is to be found, English or American, in which such a marriage was held good, where the direct question was presented for adjudication. The doctrine is distinctly recognized by Chief Justice Holt in Wigmore's case,[6] by Cowen, J., in Starr *v.* Peck,[7] and by Chief Justice Boyle in Dumaresly *v.* Fishly;[8] but in all these cases this expression of opinion is mere *obiter dicta*, the facts in the respective cases not calling for a decision upon this point.

4. While, as was just observed, no adjudged case is to be found expressly holding a marriage *per verba de futuro cum copula* valid

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[1] App. No. 1, Roper, H. & W. 447–8; 2 Bright, H. & W. 870–2.

[2] Halkerston's Dig. Marriage Law of Scotland, 455 *et seq.*

[3] Ibid. 456; Bankton, lib. 4, tit. 5, § 8.

[4] 2 Com. 87, and note.

[5] 2 Greenl. Ev. § 460; 1 Bouvier's Inst. 110; Bishop, Mar. and Div. §§ 90, 91. And see Reeve's Dom. Rel. 196, note.

[6] Wigmore's case, 2 Salk. 438.

[7] Starr *v.* Peck, 1 Hill, 270.

[8] Dumaresly *v.* Fishly, 3 A. K. Marsh. 369. The same remarks are applicable to the cases cited from the Ecclesiastical Reports, ante, § 1, note 2.

in law, it is to be remarked that in two cases recently arising in the United States, the doctrine has been very distinctly and emphatically repudiated. In the first of these, determined by the New York Court of Appeals in 1857, that court, without a dissenting voice, held a marriage of the character now under consideration utterly invalid, and a daughter, the issue of such supposed marriage, illegitimate, notwithstanding the fact that the parties, subsequently to the birth of such daughter, had formally solemnized their marriage contract in accordance with existing statutory requirements, and recognized her as their offspring, bringing her up and providing for her, precisely as if born in ordinary wedlock. No allusion was made by the court to The Queen *v.* Millis, but they referred in terms of approbation to the views of Mr. Jacob in his Addenda to Roper on Husband and Wife,[1] and expressed a willingness to adopt his conclusions as to the effect of irregular marriages in England prior to the adoption of the Marriage Act. At the same time they were careful to limit their decision to the facts in the case before them, and to state distinctly that while they pronounced against the validity of marriages *per verba de futuro cum copula*, they regarded the sufficiency of marriages *per verba de præsenti* as too firmly established by judicial decisions in that State, to be called in question.[2]

5. In Duncan *v.* Duncan,[3] decided in 1859, the Supreme Court of Ohio followed the ruling in Cheney *v.* Arnold, although in its facts it differed materially from the latter case. It was a proceeding for dower. The petitioner, without any attempt at the forms of marriage, had taken up her residence with the person whose widow she afterwards claimed to be, and cohabited with him, with full knowledge that he had a wife then living, but with the understanding that as soon as he could procure a divorce he would marry her. He, however, introduced and spoke of the petitioner as his wife, and she passed among the neighbors as such. No divorce was ever obtained; but after the parties had maintained, for several years, this adulterous connection, news came of the death of the lawful wife, and thereupon the husband renewed to the petitioner his promise that he *would* marry her, but no actual marriage, in any form, was ever celebrated between them, and they continued to cohabit as before until he died.

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[1] 2 Roper, H. & W. 445; 2 Bright, H. & W. 369; ante, ch. 3, § 14.

[2] Cheney *v.* Arnold, 15 N. Y. (1 Smith,) 345.

[3] Duncan *v.* Duncan, 10 Ohio St. 181.

The court, upon this state of facts, held that the petitioner was not the widow of the deceased, and declared, as a rule of law in Ohio, that "mutual promises to marry in the future, though made between parties competent to contract, and followed by cohabitation as husband and wife, is not, in itself, a valid marriage."

6. There can be no doubt as to the correctness of the judgment of the court in this case overruling the claim of the petitioner, for it is manifest that the facts, instead of making out a marriage contract *per verba de futuro cum copula*, as recognized by the leading authorities supporting such marriages, established precisely the contrary. The connection relied on to make out the marriage was confessedly meretricious in its inception. The parties, in defiance of every principle of decency, and in open violation of the law, were living notoriously in a state of adultery, for which they were liable to be indicted and punished under the criminal laws of the State. The law writers, and those judges who claim for a contract of future marriage, followed by cohabitation, the sanctity of the marriage relation, are generally careful to place their claim upon such grounds as would effectually exclude a connection of the character proven in the above case from any of the rights or incidents of actual marriage. The cohabitation, says Chancellor Kent, must be without any circumstances to disconnect the mutual promise from the cohabitation; there must be no previous illicit connection, and marriage must be really intended by the parties.[1] Lord Campbell's observations are to the same effect: "If the woman, in surrendering her person, is conscious that she is committing an act of fornication, instead of consummating her marriage, the *copula* can not be connected with any previous promise that has been made, and marriage is not thereby constituted."[2] The presumption of the interchange of consent to present marriage at the moment of the *copula*, is a presumption of evidence merely, and, like other presumptions of that character, may be rebutted by the facts and circumstances of the particular case.[3] In Cunningham *v.* Cunningham,[4] Lord Eldon and Lord Redesdale held that in cases of cohabitation the presumption was in favor of its legality; but where it was known to have been illicit in its origin,

[1] 2 Com. 8th ed. 87, note d.

[2] In The Queen *v.* Millis, 10 Clark & Fin. 534, 782.

[3] Bishop, Mar. and Div. § 93.

[4] Cunningham *v.* Cunningham, 2 Dow. 482.

that presumption could not be made.[1] This language, it is true, had reference, more particularly, to cases where the inception of the connection is known to be unlawful, and there is no evidence of a marriage contract in any form, rather than to cases where, during the connection, there has been an express promise of future marriage, attended by a continuance of the intercourse. Nevertheless, in principle, it would seem to be fairly applicable to cases of the latter class; for where a woman voluntarily yields her person to the embraces of an adulterer, with full knowledge of the guilty nature of the act, a promise of future marriage would hardly justify the presumption that subsequent cohabitation was referable to such promise, and intended as a consummation of the contract. The circumstances would appear to repel rather than create such a presumption. In Scotland, however, the rule is otherwise held, and it has there been determined that, notwithstanding the parties were living in fornication before the promise of future marriage, the presumption is that after such promise the woman refused to continue the connection unless put upon an honorable footing.[2]

7. In the course of the discussion of the subject of the marital contract, we have seen that an attempt to ascertain and state with precision the rule of the ancient common law with regard to its essential requisites, is attended with great if not insuperable difficulties. The English authorities have been and continue to be conflicting. The court of last resort of that country was equally divided upon the question. In the United States, while there is no difference among the text writers, there is a direct conflict in the views of the judges of some of the sister States. The decided cases preponderate but slightly in favor of the validity of private contracts of marriage. In many States no decision upon the question has yet been made. In no case directly presenting the question, has a marriage contract *per verba de futuro*, followed by *copula*, been held good; while the courts of two of the principal States have decided against the validity of such marriages. The views and arguments of the text writers who maintain the legality of both these descriptions of marriage contract, are entitled to great weight, not only on account of the deserv-

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[1] See note, Fenton *v.* Reed, 4 John. 52.

[2] Sim *v.* Miles, 8 Scotch Sess. Cas. 89, 97; 1 Fras. Dom. Rel. 195; Bishop, Mar. and Div. § 95. See the strictures of Mr. Bishop on the case of Cheney *v.* Arnold, Bishop, Mar. and Div. § 91, a. and note to that section.

edly high legal reputation of the writers themselves, but because, also, their conclusions are founded upon careful investigation and mature consideration of the subject. And while the mind is inclined to yield assent to the force of their reasoning, and to concur with them in the conclusion that, like any other contract, the marriage engagement, in its essence, requires nothing more than the mutual consent of competent parties to make it perfect and complete, still it must be admitted that this doctrine is far from being satisfactorily established by the adjudged cases, as a general rule of American law. And it may be safely assumed that, in many of the States at least, it will remain an open question for a series of years to come.

CHAPTER VI.

WHETHER THE IRREGULAR MARRIAGE CONFERS A RIGHT OF DOWER.

§ 1. Introductory.
2–4. Doctrine of the ancient text-books.
5, 6. Tendency of the modern English authorities.
7. Views of American text writers.
§ 8. Analysis of the authorities.
9, 10. Incidents of the irregular marriage in England.
11, 12. Inapplicability of the English doctrine in the United States.

1. It might be reasonably supposed that a correct solution of the question respecting the validity of irregular marriages at common law, would necessarily determine the further question whether such marriages are sufficient to confer a right of dower. For if they be perfect and complete in contemplation of law, it would seem to follow that all the rights and incidents of marriage, including the right of dower, would attach thereto. But this result does not necessarily follow; and, strange as it may appear, if we assume the validity of this class of marriages to be fairly established, we shall find that the question yet remains whether, at common law, they entitle the wife to dower.

2. The old text writers appear to agree that formal solemnization of the marriage was necessary to create, on behalf of the wife, the right to this estate. Thus, Swinburne lays down the rule that spousals *de præsenti*, without solemnization, do not, according to the law of England, render the issue legitimate, nor give to the wife the right of dower, nor to the husband the right of property in the wife's goods, nor of administering upon her estate.[1] The same doctrine is stated by Ayliffe,[2] and also by Perkins.[3] And in Fitzherbert's Natura Brevium this case is given: "A woman married in a chamber shall not have dower by the common law. 16 H. 3. *Quaere* of marriages made in chapels not consecrated, &c., for many are by license

[1] Swinb. on Spousals, 2, 15, 234, 235.
[2] Ayliffe's Par. 245.
[3] Perk. sec. 194, 195, 306.

of the bishop married in chapels. And it seemeth reasonable that in such case she shall have dower."[1]

3. In Lord Hale's MSS. we find this case stated:[2] "A. contracts *per verba de præsenti* with B., and has issue by her, and afterwards marries C. in *facie ecclesiæ*. B. recovers A. for her husband by sentence of the ordinary, and for not performing the sentence he is excommunicated, and afterwards enfeoffs D., and then marries B. in *facie ecclesiæ*, and dies. She brings dower against D. and recovers, because the feoffment was *per fraudem mediate* between the sentence and the solemn marriage." But Lord Hale adds that this recovery was reversed *coram rege et concilio*, for the reason that neither the contract nor the sentence was a marriage, and therefore the husband had no seizin during his marriage with the demandant.

4. In Bacon's Abridgment[3] the same general doctrine is stated in the following terms: "In order to make the marriage complete, so as to entitle the wife to dower, the issue to inherit, &c., the same must be celebrated in *facie ecclesiæ;* and therefore the private contract, without the priest's blessing, makes no marriage; though such contract may be enforced in the spiritual court." Blackstone, selecting his words with great circumspection, says:[4] "Any contract made *per verba de præsenti*, or in words of the present tense, and in case of cohabitation *per verba de futuro*, also, between persons able to contract, was, before the late act, deemed a valid marriage to *many* purposes, and the parties might be compelled, in the spiritual courts, to celebrate it in *facie ecclesiæ.*" But for *what* purposes it was deemed valid, and for what invalid, he expresses no opinion, leaving us to infer, however, that such a marriage was not considered sufficient to clothe the parties with *all* the rights belonging to the perfect and complete marriage contract.

5. The more modern English text writers refer, with but little in the way of explanation or comment, to this condition of the common law as laid down in the ancient authorities. Thus, Mr. Shelford says:[5] "The common law had scruples in applying the civil rights of dower, and community of goods, and legitimacy, in cases of mere contracts of marriage, unaccompanied by celebration in the face of the church. . . . . The text writers upon this subject agree in the

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[1] Fitzh. N. B. 150, N.
[2] Co. Litt. 33 a. note 10.
[3] 4 Bac. Ab. 531, tit. Mar. and Div., C.
[4] 1 Com. 439.
[5] Shelf. Mar. and Div. 35, 36.

necessity of a solemnization to confer the civil rights of marriage." And Mr. Park, in his work on Dower,[1] observes: "But though espousals, or affiance, as it is sometimes termed, was thus the very substance of matrimony, and even by the temporal lawyers the terms affiance and marriage were often promiscuously used, yet it does not seem to have been allowed that espousals alone, unaccompanied by celebration, should confer the civil rights of dower, or legitimacy; but to obtain these temporal advantages it was requisite that the contract of matrimony should be celebrated in the face of the church."

6. We have already referred to the elaborate opinion of Lord Stowell, in Dalrymple *v.* Dalrymple,[2] as sustaining the validity of private marriages with great learning and ability. Yet even he remarks that "the common law certainly had scruples in applying the civil rights of dower and community of goods, and legitimacy, in the cases of these looser species of marriage." And while the six law lords, who delivered opinions in the case of The Queen *v.* Millis, were equally divided as to the validity of this class of marriages, they all, except Lord Brougham, admit that a marriage not celebrated in the face of the church, whatever else it may have been good for, did not carry with it the incident of dower. The views of Mr. Jacob and Mr. Macqueen, to the same effect, have already been given at length.[3]

7. The American authorities reflect but little light upon this perplexing phase of the question, the reports being, in a measure, barren of cases involving its discussion. Nevertheless we find Chancellor Kent, while maintaining without hesitation or qualification the validity of private marriages at common law, noticing with scrupulous exactness the peculiarity now referred to. "It would seem," he says, "to have been a question under the ecclesiastical law, prior to the English statute of 26 Geo. II., whether a contract of marriage, though followed by cohabitation, was not essentially imperfect unless it was solemnized by the intervention of a priest. *It would not entitle the wife to dower*, (Perkins, sec. 194, 306,) nor entitle the husband to administer on his wife's estate; Haydon *v.* Gould, in the court of delegates, 1 Salk. Rep. 119. The intervention of a person in holy orders seems to have been assumed in the cases as a

[1] Park, Dow. 8.

[2] Dalrymple *v.* Dalrymple, 2 Hag. Con. R. 54, 68; ante, ch. 3, § 12.

[3] 2 Roper, H. & W. 474; 2 Bright, H. & W. 397; ante, ch. 3, § 14; Macq. H. & W. 4, 5; ante, ch. 3, § 16.

material circumstance; The King *v.* The Inhabitants of Brampton, 10 East. 282; Latour *v.* Teesdale, 8 Taunt. Rep. 830."[1] And an American writer upon the subject of dower states the rule with regard to marriage as follows: "The claimant, demanding dower, must be the actual wife of the person at the time of his decease. *And the marriage must have been solemnized in the manner required by law,* and between persons capable of contracting matrimony together."[2] But whether it is intended by this language to express an opinion adverse to the validity of marriages not solemnized in accordance with statutory formalities, or merely as to the sufficiency of such marriages to entitle the wife to dower, does not very clearly appear.

8. In no English case has it been held that the irregular marriage, or marriage by private contract, merely, confers the right of dower. In none of the cases in which an opinion was expressed by English judges in favor of the sufficiency of such marriages, was any question as to the right of dower involved. In the case stated by Lord Hale, the decision was directly against the claim of the alleged wife. Nor has any English writer ventured a decided opinion that these marriages are attended with this important incident of the perfect and complete marital contract. And in the United States not one of the cases maintaining the validity of contracts *de præsenti* was founded on an application for dower. Jackson *v.* Claw,[3] and Donnelly *v.* Donnelly,[4] were decided expressly upon the ground of a presumed actual solemnization of marriage.

9. But the inquiry immediately and naturally arises—If a marriage by private contract fails to give the woman the right of a widow in respect to dower, and the man the right of a husband in respect to the woman's property, and does not render the issue legitimate, nor impose upon the woman the disabilities of coverture,[5] *what* incidents of the marriage relation can possibly attach thereto, and what is the nature of that connection which the parties are, by law, enabled to assume at will, and under cover of which cohabitation may be carried on for an indefinite period of time, but which, nevertheless, brands the issue with the stain of illegitimacy? In England the question is thus answered: "At common law, a contract entered into by words of present consent was indissoluble. The parties could

[1] 2 Com. 87, note a.
[2] Lambert on Dower, 14.
[3] Jackson *v.* Claw, 18 John. 846; post, ch. 7, § 11.
[4] Donnelly *v.* Donnelly, 8 B. Mon. 113; ante, ch. 4, § 16.
[5] Macq. H. & W. 4; 2 Roper, H. & W. 474; 2 Bright, H. & W. 879.

not release each other from the obligation. Either party, too, might by a suit in the spiritual court compel the other to solemnize the marriage in *facie ecclesiæ*. It was so much a marriage, that if they cohabited together before solemnization, they could not be proceeded against for fornication, but merely for a contempt. If either of them cohabited with another person, the parties might be proceeded against for adultery. The contract, moreover, was considered to be of the very essence of matrimony, and was, therefore, and by reason of its indissoluble nature, styled in the ecclesiastical law *verum matrimonium*, and sometimes *ipsum matrimonium*. Another, and a most important effect of such a contract was, that if either of the parties afterwards married with another person, solemnizing such marriage in *facie ecclesiæ*, the same might be set aside, even after cohabitation and after the birth of children; and the parties might be compelled to solemnize the first marriage in *facie ecclesiæ*."[1]

10. It would seem, therefore, according to this view, that where a private contract of marriage existed, though not solemnized in *facie ecclesiæ*, neither of the parties could release the other from its obligations, nor make a valid contract of marriage with a third person; and either of them might compel the other, by proceedings in the spiritual courts, to solemnize the marriage according to the prescribed formalities of the ecclesiastical law. It would appear, further, that in withholding from such contract the ordinary incidents of marriage; in refusing to recognize the legitimacy of the issue, the right to dower, and the usual rights of a husband in the estate of the wife; and at the same time declaring the parties united in a bond indissoluble in its nature, the ecclesiastical courts sought to make it compulsory upon them to solemnize the marriage in *facie ecclesiæ*, and submit to all the burdens and exactions imposed by the church. This power they were enabled to exercise, for, by the ancient common law, temporal courts possessed no power nor jurisdiction to try the issue of *ne unques accouplé*. The legality of espousals was always triable by the bishop, and, by the old rules of pleading, it was prohibited to bring in issue to the country a question which, like that of the *legality* of a marriage, it was the sole and exclusive privilege of the ecclesiastical courts to decide. Any plea, or replication tending to that effect, was treated as an attempt to oust the bishop of his jurisdiction; and though the temporal courts are now considered as having the inherent power of

[1] Macq. Husb. and Wife, 5.

deciding incidentally, either upon the fact or legality of marriage, where they lie in the way to the decision of the proper objects of their jurisdiction, yet in cases of writs of dower, and other real actions, where the issue is upon the *legality* of the marriage, they have declined departing, except in cases of necessity, from the old technical rule, which requires the mode of trying the question to be by the certificate of the ordinary.[1] The common law, as administered in the temporal courts, simply required that there should be a lawful marriage, as the foundation of civil rights, leaving the question as to what constituted a lawful marriage to be determined according to the law administered by the ecclesiastical courts: if a woman united to a man by contract only, without solemnization in *facie ecclesiæ*, did not recover dower, it was only because the ecclesiastical courts refused to acknowledge such a union as conferring the right upon her. It was the same with respect to questions of legitimacy, which depended, in general, upon the bishop's certificate.[2] And this anomalous state of things was the result of the policy adopted by the ecclesiastical courts. If a private contract of marriage were entered into, the contracting parties found themselves burdened with obligations and responsibilities it was utterly out of their power to shake off during the period of their joint lives. If they cohabited together, though not punishable for fornication, they were nevertheless liable to spiritual censure. If either of them entered into a solemn and formal matrimonial alliance with another, the spiritual court would annul such second marriage, on the ground of the pre-contract, and pronounce the issue illegitimate. All the valuable property rights and incidents of marriage were withheld, and the consequence was, people were compelled, in the solemnization of their marriages, to submit to the usurpations and comply with the requisitions of the ecclesiastical functionaries of the realm.

11. But in the United States we have no courts of a spiritual character. With us there is no tribunal furnished with the machinery,

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[1] Park on Dower, 11, 12, and the authorities there cited; Robins *v.* Crutchley, 2 Wilson's R. 127; Co. Litt. by Thomas, 33 a. note (C.) By the 20 & 21 Vict. c. 85, passed Aug. 28th, 1857, which went into operation in the following year, the English ecclesiastical courts are deprived of their jurisdiction over matrimonial causes, and a new court, called "The Court for Divorce and Matrimonial Causes," is thereby created, which exercises that jurisdiction.

[2] Jacob's note, 2 Roper, Husb. and Wife, 473; 2 Bright, Husb. and Wife, 396. And see Haydon *v.* Gould, 1 Salk. 119; Bunting *v.* Lepingwell, 4 Coke, 29, and note (D); Kenn's case, 7 Coke, 42 b. and note (B.)

or clothed with the power, of compelling the specific performance of a contract to marry.[1] Hence if we adopt, without modification, the supposed rule of the common law upon this subject, we are in an infinitely worse condition than the people of England; for while any of our citizens who should undertake to contract a marriage in *præsenti* would be subjected to all the difficulties and embarrassments with which the ecclesiastical courts have environed the irregular marriage in England, in the event that either of the contracting parties should afterwards refuse to solemnize the marriage in a more formal manner, the other, having no forum to which to appeal for the enforcement of a more complete performance, would be neither married nor unmarried. If the man were the refractory party, the woman could not have her dower, and the issue, being under the ban of illegitimacy, would be deprived of the right of inheritance to the estate of the father. Consequences similar in their nature would flow from the refusal of the wife to consent to a formal solemnization of the contract, and the *quasi* husband would find himself shorn of his most important and valuable marital rights.

12. It would be absurd to suppose that those American judges who have pronounced in favor of the validity of private marriages, ever contemplated the necessity of any superadded legal or clerical formalities to render them perfect and complete in all respects. "If we could presume that our legislature had in view the common law of England as declared by the judges in The Queen *v.* Millis," say the Supreme Court of Ohio, "we cannot suppose that, in the absence and abnegation of all ecclesiastical power and authority over civil rights, there would have been a failure to provide some remedy, or to make some provision in reference to a contract which was so binding as to be 'indissoluble; the parties could not release each other from the obligation.' 10 Cl. & Fin. 832. The legislature must have proceeded on the idea of the entire inapplicability of any such rule of the common law in this State, where ecclesiastical authority binds those only who render a voluntary submission."[2] The case of Dumaresly *v.* Fishly,[3] where a marriage *de præsenti* was treated as a marriage *de facto*, and, as such, good for some purposes only, and

[1] See Burtis *v.* Burtis, 1 Hopkins, 557; Perry *v.* Perry, 2 Paige, 501.

[2] Carmichael *v.* The State, 12 Ohio St. R. 553, 558; see, also, opinion of Ford, J., in Pearson *v.* Howey, 6 Halst. 12, and the observations of the court upon this subject in The State *v.* Samuel, 2 Dev. & Bat. L. Rep. 177.

[3] Dumaresly *v.* Fishly, 3 A. K. Marsh. 368; ante, ch. 4, § 15.

the case of Mangue *v.* Mangue,[1] where a similar view was expressed, are the nearest approach we have to the application of the English doctrine in this country.[2] But under our system of laws it is a solecism in language to speak of a marriage as good for some purposes and not good for all—as a marriage which is not a marriage. And it may be safely said that in those States where the courts already have, or hereafter shall determine in favor of the validity of private marriages, such marriages will be regarded as being attended with all the civil rights and obligations which, under the ecclesiastical law, flow from a marriage duly solemnized in *facie ecclesiæ*, and therefore that they confer upon the wife the right to dower.[3]

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[1] Mangue *v.* Mangue, 1 Mass. 240; ante, ch. 4, § 19.

[2] See strictures of Mills, J., in his dissenting opinion, upon the result of this doctrine, 3 A. K. Marsh. 368.

[3] See Rose *v.* Clark, 8 Paige, 574; Starr *v.* Peck, 1 Hill, 270; Clayton *v.* Wardell, 4 Comst. 230; Cheney *v.* Arnold, 15 N. Y. 345; Londonderry *v.* Chester, 2 N. H. 268.

CHAPTER VII.

OF MARRIAGES VOID IN LAW.

§ 1, 2. Marriage *de facto* and marriage *de jure*.
3, 4. Matters which render a marriage void.
5–15. Prior marriage undetermined.
16, 17. Idiocy.
18–20. Lunacy.
21. Duress.
22–27. Fraud.
28. Error.
29. Marriage induced by duress, fraud, or through error, at the option of the injured party, treated as voidable only.
30. Statutes requiring a decree of nullity.
31. Marriage within the prohibited degrees.
32–34. Marriage between whites and negroes.
35–36. Failure to observe statutory regulations.

Marriage de facto and marriage de jure.

1. LITTLETON, in that part of his great work which relates to dower, says that the wife shall have her dower, whether she hath issue by her husband or no, and of what age soever she be, "so as she be past the age of nine years at the time of the death of her husband."[1] Lord Coke, in his commentary upon this text, remarks: "Here Littleton speaketh of a wife generally, and generally it is to be understood as well of a wife *de facto* as *de jure*."[2] The correctness of the principle thus tersely stated has received general if not universal recognition, both in the English and American courts, whenever a case has arisen requiring its practical application. That a wife *de jure*—there having been no intervening divorce *a vinculo*—should be entitled to dower, could admit of no question. Nor could any serious doubts arise as to what constituted a marriage *de jure*. But the elements of a marriage *de facto*, and the characteristics distinguishing it from a marriage of the other class, have not always been explained with clearness and precision.

2. It has sometimes been supposed that the phrase "marriage *de*

[1] Litt. § 36.

[2] Co. Litt. 33, b.

facto" imports a private marriage, or contract of matrimony concluded without the intervention of proper clerical or magisterial authority; a marriage *de jure*, on the other hand, being understood to be such a marriage as is attended, in its solemnization, with all required statutory formalities.[1] But this is an error. A marriage *de facto* is not distinguished from a marriage *de jure* by the mode or manner of its celebration; a private marriage, in those States where the statutory requisites are not regarded as indispensable, being considered as much a marriage *de jure*, and as perfect and complete in every respect as if all requirements of the statute had been scrupulously followed.[2] A marriage *de jure* is one that is neither void nor voidable in law. A marriage *de facto* is one that is open to legal objection, not from any want of the requisite solemnities, but from pre-existing impediments or other causes, rendering it liable to be dissolved *ab initio*, and therefore *voidable*.[3] Although liable to be entirely annulled by decree of the proper tribunal, such a marriage is valid in law, and carries with it all the incidents of the marriage *de jure* until such decree is pronounced.[4] And if no decree of separation be actually made during the lifetime of both the parties, the marriage is then considered no longer voidable, but shall stand, for after the death of either of the parties it is too late to apply for the avoidance of the marriage contract.[5] Therefore, when Lord Coke observes that a wife *de facto* as well as a wife *de jure* is entitled to dower, he is to be understood as meaning that all marriages not absolutely void, including those that are voidable, but which have not been dissolved during the lifetime of the parties, confer a right to that estate; and this is the well-established rule on this subject.[6]

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[1] See Dumaresly *v.* Fishly, 8 A. K. Marsh. 368; ante, ch. 4, § 15; Mangue *v.* Mangue, 1 Mass. 241; ante, ch. 4, § 19; 2 Roper, H. & W. 462.

[2] See ante, ch. 6, §§ 11, 12.

[3] Co. Litt. 82, a., 33, b.; 1 Roper, H. & W. 333; 2 Ibid. 462; 2 Bright, H. & W. 385; Park, Dow. 14, 21; 1 Bl. Com. 434, and note; Bishop, Mar. and Div. § 57; Brury's case, 5 Co. 98, b.; Wickham *v.* Enfeild, Cro. Car. 352; Hemming *v.* Price, 12 Mod. 432; Remington's case, Noy's Rep. 29; Sabell's case, 2 Dyer, 178, b.; 1 Moore, 225–8; Elliott *v.* Gurr, 2 Phill. Ec. C. 16; Adkins *v.* Holmes, 2 Carter's (Ind.) R. 197; Bonham *v.* Badgley, 2 Gilm. 622; Cropsey *v.* McKinney, 30 Barb. 47; Gathings *v.* Williams, 5 Ired. L. 487; State *v.* Moore, 8 West. Law Jour. 184.

[4] Ibid.; post, ch. 8, § 19.

[5] Ibid.; Shelf. Mar. and Div. 154.

[6] See the authorities cited ante, note 3.

Matters which render a marriage void.

3. The right to dower does not attach upon a marriage void in law, and it is now proposed to notice briefly those matters which render a marriage contract, although solemnized with every requisite formality, wholly ineffectual to confer the legal rights or incidents of the true marriage relation.

4. The impediments to marriage are of two kinds—canonical and civil. The first interpose obstructions to the celebration of marriage; the other affect its validity, notwithstanding its actual solemnization in due form. The canonical disabilities are consanguinity, affinity, and impotence. They render a marriage voidable only, unless otherwise provided by statute.[1] The civil disabilities are prior marriage undetermined, idiocy, lunacy or mental incapacity, and want of age. These disabilities, with the exception of the latter, make the contract void *ab initio*, because the parties are incapable of contracting.[2] Marriage procured by duress is also considered void; and in some States the violation of certain statutory regulations is attended with the same result. The disability arising from want of age produces substantially the same effect as a canonical disability. The marriage may be avoided by either of the parties when the party laboring under the disability arrives at the age of consent.[3]

5. *Prior marriage undetermined.*—A second marriage, while a former husband or wife is living, is *ipso facto* void, without any divorce, as well by the spiritual as by the common law.[4] In the United States this rule has been applied in several cases involving the right of dower.[5]

6. By a statute of first James I., chap. 2, passed in 1603, it was made felony to contract a second marriage in England or Wales while the first husband or wife was living. A subsequent clause of the same statute introduced an exception in favor of all persons whose husband or wife had remained seven years beyond sea, or the

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[1] See ch. 8, § 18.

[2] Shelf. Mar. and Div. 154; Bishop, Mar. and Div. § 46, and ch. 11.

[3] See Bishop, Mar. and Div. § 56; post, ch. 8, §§ 2–10.

[4] 1 Bl. Com. 434–6; Shelf. Mar. and Div. 223; Park, Dow. 304; 2 Kent, 79; 1 Salk. 121; Riddlesden *v.* Wogan, Cro. Eliz. 858; Gaines *v.* Relf, 12 How. U. S. 472.

[5] Donnelly *v.* Donnelly, 8 B. Mon. 113; Smart *v.* Whaley, 6 Smedes & Marsh. 308; Higgins *v.* Breen, 9 Misso. 497; Smith *v.* Smith, 5 Ohio St. 32.

same period within his majesty's dominions, not known by the other to be living; persons divorced, persons whose marriages had been judicially declared void, and persons married within the age of consent. In all these cases the party contracting the second marriage was exempted from the penalties attaching to the offence of bigamy. Subsequent legislation has changed this statute in some particulars. A divorce *a mensa et thoro* is no longer a protection against the penal consequences of a second marriage, nor is seven years residence beyond the sea any protection, where the absent party is known to the other to be living.[1]

7. Many of the material portions of this act have been incorporated with the legislation of most and perhaps all the American States. By the statute law of New York the same exception against the penal consequences of a polygamous marriage is made, when the husband or wife, as the case may be, of the party who enters upon the second marriage, remains continually without the United States for five years together; or when one of the married parties shall have absented himself or herself from the other for the space of five successive years, and the one remarrying shall not know the other, who was thus absent, to be living within that time; or when the person remarrying was, at the time of such marriage, divorced by the sentence of a competent court for some other cause than the adultery of such person; or if the former husband or wife of the party remarrying had been sentenced to imprisonment for life; or if the former marriage had been duly declared void, or was made within the age of consent.[2] In Ohio the only exception from the operation of the statute against bigamy is where the former husband or wife has been continually and willfully absent for the space of five years together, and unheard from, next before the time of such marriage.[3] In Massachusetts the absence must be for seven years.[4] Similar enactments will be found on the statute books of most of the States.

8. Under the New York statute, where the husband or wife is absent for more than five years, and is not known to be living, and the other party has contracted a second marriage in good faith, such second marriage is voidable only, and not void, even though the first

[1] Bishop, Mar. and Div. § 203; Shelf. Mar. and Div. 226; Roger's Ecc. Law, 2d ed. 634.

[2] 2 Kent, 79; 2 N. Y. Rev. St. pp. 139, 687; Ibid. 688, § 11.

[3] 1 Swan & Critchfield's Rev. Stat. 404, § 7.

[4] Rev. St. 1836, 739, § 3.

husband or wife returns. It stands as a good marriage until annulled by a court of competent authority in proceedings regularly instituted for that purpose.[1] But, except in those States where provisions of this character are in force, the clause exonerating parties from responsibility to the criminal laws has no other effect. It gives no validity to the second marriage; for it is a principle of the common law, and one generally recognized throughout the Christian world, that no length of time, or absence, and nothing but death, or the decree of a court clothed with full power to that end, can dissolve the marriage tie. In the absence of all statutory regulations to the contrary, this principle applies in the United States. For this reason, although the penalties denounced by the criminal law against polygamy are not incurred in the excepted cases, yet if the former husband or wife be living, though the fact be unknown, and the first marriage has not been duly dissolved, the second marriage is absolutely void, and both parties are subjected to the harsh consequences resulting from an unlawful connection.[2] So far as the guilty party is concerned, it may be that these consequences furnish no just ground of complaint against the law. Not so, however, as to the party who, as unfortunately sometimes happens, by artifice and deceit, has been entrapped into the forbidden connection. Where a pure-minded and virtuous female, innocent of all wrong, has been heartlessly deceived into an alliance sanctioned by all the formalities bestowed upon lawful wedlock, no good reason can be urged why, as some compensation for the cruel wrong inflicted upon her, she should not be entitled to all the rights and claims of a wife upon the estate of the guilty individual who has betrayed her confidence; and it is far from creditable to the civilization of the age that no step has yet been taken in that direction. In some of the States the severity of the common law has in one important particular been essentially

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[1] 2 R. S. 139, § 6; Valleau *v.* Valleau, 6 Paige, 207; Cropsey *v.* McKinney, 30 Barb. 47. See Bishop, Mar. and Div. § 55.

[2] 1 Roll. Abr. 340, pl. 2; 357, pl. 40; 360 F.; Poynter, Mar. and Div. 146; Bishop, Mar. and Div. § 205; 2 Kent, 80; Ganer *v.* Lanesborough, Peake, 17; Kenley *v.* Kenley, 2 Yeates, 207; Williamson *v.* Parisien, 1 John. Ch. 389; Fenton *v.* Reed, 4 John. 52; Zule *v.* Zule, Saxton, 96; The State *v.* Moore, 3 West. Law Jour. 134; Smith *v.* Smith, 5 Ohio St. 32; Heffner *v.* Heffner, 11 Harris, Pa. St. 104; Janes *v.* Janes, 5 Blackf. 141; Sellars *v.* Davis, 4 Yerg. 503; Young *v.* Naylor, 1 Hill's Eq. (S. C.) 383; Smith *v.* Smith, 1 Texas, 621; Martin *v.* Martin, 22 Ala. 86; Smart *v.* Whaley, 6 Smedes & M. 308; Higgins *v.* Breen, 9 Misso. 497; Donnelly *v.* Donnelly, 8 B. Mon. 113.

mitigated. In Ohio, Missouri, Texas, and California there are statutory provisions which declare that the *issue* of all marriages deemed null in law, shall nevertheless be legitimate.[1] But, with the exception of Louisiana, it is believed there is no State where the stern rule of the common law, operating with equal severity against the innocent and guilty parties to the second marriage, has been so modified as to give to the wife any right in the husband's estate.

9. In Louisiana, where the more liberal rule of the civil law is recognized, the courts, in some measure, protect the wife, where she is the innocent party, against the cruel consequences which the common law visits upon a matrimonial contract rendered null by reason of a previous marriage. If a woman be deceived into marriage with a man who has a former wife living, she is entitled, so long as the deception continues, to all the rights of a wife,[2] and the children born during the same period are regarded as legitimate. The same rule prevailed in Texas before the introduction of the common law into that State, and while it was subject to the law of Mexico. And by the same system the second marriage is converted into a complete and lawful marriage by the removal of the disability; as, if there be a former husband or wife of one of the parties living, the marriage becomes good on the death of such person.[3]

10. And there are occasional cases to be found in other States, in which the courts, evidently shocked at the unbending severity and injustice of the common law in its failure to discriminate between the innocent and the guilty, have gone very far in their efforts to divest particular cases of the hardships attending the application of the rule. Thus in Donnelly *v.* Donnelly,[4] parties were regularly married, in 1817, in the State of Kentucky. They cohabited together as husband and wife until the death of the husband, a period of about twenty-one years, and were the parents of a family of children, issue of the marriage. The wife brought considerable property to the husband, all of which was freely surrendered to him, and during the

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[1] Wright *v.* Lore, 12 Ohio St. 619; Lincecum *v.* Lincecum, 8 Misso. 441; Hartwel *v.* Jackson, 7 Texas, 576; Graham *v.* Bennett, 2 Cal. 503.

[2] Clendenning *v.* Clendenning, 15 Mart. La. 438, (vol. iii. N. S. 587.) See Hubbell *v.* Inkstein, 7 La. Ann. 252.

[3] Bishop, Mar. and Div. § 208; Smith *v.* Smith, 1 Texas, 621. And see Yates *v* Houston, 3 Texas, 433; Lee *v.* Smith, 18 Texas, 141; Patton *v.* Philadelphia, 1 La. Ann. 98.

[4] Donnelly *v.* Donnelly, 8 B. Mon. 113.

entire period of the cohabitation she had deported herself as a true and faithful wife. After his death, claimants for his estate appeared from the State of Maryland, founding their demand upon the alleged fact that they were the lawful issue of a marriage contracted by the deceased some twenty-five years anterior to the marriage in Kentucky, and that the wife of that marriage was living at the time of the second marriage. Upon a trial had, all these statements were satisfactorily established by evidence, and the court was compelled to hold the second marriage absolutely void. But it being shown that after the death of the first wife the parties to the subsequent marriage had continued their connection as husband and wife; that they treated each other as such, and were generally reputed as holding that relation, the court pronounced this evidence sufficient to justify the presumption of a marriage after the death of the first wife, although, as a matter of fact, the evidence tended very clearly to show that the Kentucky wife had no knowledge or suspicion of the first marriage until after the decease of her husband. Not entirely satisfied, however, that all the facts and circumstances taken together fully supported this presumption, the court proceeded to show that there were other grounds upon which the claim of the supposed wife to such portion of the estate of the deceased husband as would be equivalent to her dower, might be satisfactorily placed: "But if we should be mistaken in this view of the case," say they, "and it should even be conceded that the facts and circumstances do not authorize the presumption of the marriage after the death of the first wife, and consequently that the defendant would not be entitled to dower, still we think she established an equitable claim to relief, equal at least to the value of a dower estate. She shows most satisfactorily that her own means, property obtained from her by Donnelly, and her industry and economy, contributed largely in the acquisition of the estate of which he died possessed. It appears that he received from her $800 to $1000, or property to that amount. She surrendered it to him upon the supposition that he was her lawful husband, and, so far as appears, labored under that impression till his death. Under such circumstances the statute of limitations relied upon by the guardian *ad litem* for several of the complainants, who were infants, has no application whatever to the case. She was defrauded of her estate, and the fact has but recently come to her knowledge. Donnelly, so far from being able to rely upon it, would be estopped to deny that she was his lawful wife. The complainants find her in

possession, by judgment of law, of an estate which she claimed as the lawful wife of their ancestor, a relation which he was estopped to deny. And it may be questioned, whether the complainants, in reference to the rights of the defendant, should not be regarded as occupying the attitude of their ancestor. That they cannot render available the lapse of time, there can, in our opinion, be no doubt. The defendant, whether ever the lawful wife of Donnelly or not, has, in our opinion, an equitable claim at least equal to the dower estate which has been allotted to her."

11. In Jackson *v.* Claw,[1] the Supreme Court of New York also went to great lengths in sustaining a claim for dower in a somewhat similar case. At the time of the marriage a former wife was known by the husband to be living, and there was good reason to suppose that the demandant was also cognizant of the fact. A year or so after the second marriage the first wife left the country, and was not heard of afterwards. The court held, first, that absence of the first wife for seven years, without having been heard from during that time, furnished presumptive evidence of her death: secondly, that although the second marriage was void, the first wife being alive when it was contracted, yet the subsequent continued cohabitation of the parties, coupled with the reputation of their marriage, and the good character which they bore in society, justified the presumption that they had solemnized a new contract of marriage after the presumed death of the first wife, so as to entitle the second wife to dower in the lands of which the husband was seized after that period. In Texas, also, the courts have gone very far in presuming a marriage in a like case, even where the evidence tended strongly to show that the connection was illicit at its commencement.[2]

12. The case of Woods *v.* Woods[3] differs from the preceding cases in the important fact that the second marriage was not solemnized until after the former husband had been absent for seven years unheard from, and consequently not until after his presumed death. A report of his death had also reached the wife before the second marriage. Dower was awarded her in the estate of the second husband, and the issue of the marriage were adjudged legitimate. "The presumption of law," said the court, "in support of marital rights is much more to be favored than a presumption against them, especially

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[1] Jackson *v.* Claw, 18 John. 346. [2] Yates *v.* Houston, 3 Texas, 433.
[3] Woods *v.* Woods, 2 Bay, 476.

when such unfavorable presumption goes to bastardize the issue of a marriage apparently legal and proper."

13. It is also worthy of remark that where it is sought to interpose an alleged prior marriage to defeat the claims of the wife, the courts, as a general thing, exact full and satisfactory proof of such marriage. Thus, in a proceeding for dower in Mississippi, the claim was resisted on the ground that at the time of the marriage the deceased husband had another wife living. It was proven that four years before the marriage he was living with another woman whom he treated as his wife; and that he said, after his marriage, and in presence of the petitioner, that his first wife was living in Georgia. It was held that this evidence was not sufficient to make out the defence.[1]

14. While upon this subject, it is proper to notice that in some of the States certain statutory restrictions, more or less comprehensive, are in force, by which a second marriage is forbidden for a stipulated period after a previous marriage has been dissolved by a divorce *a vinculo*. In Kentucky the statute of 1809 provides that a decree of divorce shall "not authorize the injured party again to contract matrimony within two years from the time of pronouncing such final decree." And it has been held that if the injured party contracts a second marriage within the two years, it is a nullity, good for no purpose whatever.[2] The same statute declares that the offending party shall remain subject to all the pains and penalties which the law prescribes against a marriage while a former husband or wife is living.[3]

15. In many of the States the guilty party is prohibited by statute from entering into a second marriage during the lifetime of the other, and it is usually held that a violation of this provision makes the second marriage void. As to the party in fault, the effect of these statutory inhibitions is to place him or her under the same disability as if no decree of divorce had passed. Thus, in Cropsy *v.* Ogden,[4] where a divorce had been decreed for the adultery of the husband, and he was subsequently married in due form in the lifetime of the first wife, it was held that the marriage was void, and did not confer dower. But this restriction is treated as being penal in its nature,

[1] Hull *v.* Rawls, 27 Miss. (5 Cush.) 471.

[2] Cox *v.* Combs, 8 B. Mon. 231. [3] Ibid. Act of 1809, 1 Stat. Law, 123.

[4] Cropsy *v.* Ogden, 1 Kern. 228; Accord. Calloway *v.* Bryan, 6 Jones' Law, (N. C.) 569.

and therefore is usually confined to the jurisdiction which imposes it.[1] Nor does it apply to foreign divorces.[2] It is made a question whether the mere prohibition, without words of nullity, should be construed to make void a marriage contracted in disobedience to the prohibition. Generally it has been held to have that effect. In a case recently considered in Georgia, however, the court intimated that the marriage would be good, or, at all events, voidable only.[3] In North Carolina it is held that where a person has been divorced by reason of misconduct on his or her part, and is, therefore, under the laws of that State prohibited from marrying again, and, for the purpose of evading the law, goes into another State, and there enters into a second marriage, such marriage is void, precisely as if contracted in the State.[4] The case in which this doctrine is announced is opposed to the Massachusetts and Tennessee cases above referred to, and is believed to be in conflict with the rule upon this subject as commonly understood and applied in our courts.[5] In Massachusetts, however, by a recent statute, a rule similar to that prevailing in North Carolina is adopted.[6]

16. *Idiocy.*—There is no doubt that at one period it was supposed an idiot *à nativitate* was competent to contract matrimony, and that after his death his widow was entitled to dower in his estate. "This doctrine as to idiots is mentioned as a point adjudged in one case, and seems confirmed by allowing dower to the wife of an idiot."[7] Lord Coke, without any apparent hesitation, states it as the rule that "the wife of an idiot, *non compos mentis*, or the like, shall be endowed."[8] So Sergeant Hawkins, in his Abridgment of Coke on Littleton, maintains "that the wife of an idiot shall have dower."[9] And in Viner's Abridgment we have the following: "If an idiot *à nativitate* takes a wife, they are baron and feme in law, and their issue legitimate, for he may consent to a marriage. Trin. 3 Jac.

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[1] Bishop, Mar. and Div. §§ 211, 212, 655–659; Cambridge *v.* Lexington, 1 Pick. 506; Putnam *v.* Putnam, 8 Pick. 433; Dickson *v.* Dickson, 1 Yerger, 110.

[2] Ibid.

[3] Park *v.* Barron, 20 Geo. 702; Bishop, Mar. and Div. § 212.

[4] Williams *v.* Oates, 5 Ired. 535; see, also, Calloway *v.* Bryan, 6 Jones' (N. C.) Law R. 569

[5] The People *v.* Hovey, 5 Barb. 117.

[6] Rev. Stat. Mass. ch. 75, § 6; Smith *v.* Smith, 13 Gray, 209. See Commonwealth *v.* Hunt, 4 Cush. 49.

[7] Co. Litt. 80, a. note.

[8] Co. Litt. 31, a.

B. R. between Still and West, adjudged upon a special verdict."[1] "A strange determination," says Blackstone, "since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to anything."[2] The force of this reasoning is obvious, and it is difficult to understand upon what principle it was ever held that a person void of understanding, and absolutely incapable of directing the most ordinary affairs of life, was nevertheless competent to form a connection so important in its consequences as that of matrimony.

17. Whatever may have been the ancient doctrine upon the subject, it is now well settled that the marriage of an idiot is absolutely void, and therefore confers no right to dower. This rule appears to result necessarily from the principle that the consent of a free and rational agent is an essential ingredient to the validity of the marriage contract.[3]

18. *Lunacy.*—The same rule, founded upon like reason, prevails where either of the parties was insane at the time the marriage contract was entered into.[4] At common law a lunatic was considered capable of marrying during a lucid interval, but by statute of 15th Geo. II. c. 30, all marriages with lunatics are declared void, although they may have been contracted during lucid intervals. But this statute is limited to cases where a commission of lunacy has been taken out, and where this has not been done, a marriage during a lucid interval is good.[5] As the statute of George II. is not in force in the United States, it is supposed that the rule of the common law generally prevails in this country. It may be remarked, in this connection, that when unsoundness of mind is relied upon to defeat

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[1] 4 Vin. Abr. 35, pl. 8; see, also, Co. Litt. 30, b. note 2: Rolle's Abr. 357; 1 Roper, H. & W. 389; Reeve's Dom. Rel. 201; Hamaker *v.* Hamaker, 18 Ill. 137; Park *v.* Barron, 20 Geo. 72.

[2] 1 Bl. Com. 438.

[3] Shelf. Mar. and Div. 188; 1 Bl. Com. 438; Park on Dower, 16; per Lord Stowell, in Turner *v.* Meyers, 1 Hagg. Con. R. 414; Sir J. Nicholl, in Browning *v.* Reane, 2 Phill. R. 69; 2 Kent, 75, 76; 1 Roper, Husb. and Wife, 389; Lambert on Dower, 17; Bishop on Marriage and Divorce, chap. ix.; Jenkins *v.* Jenkins, 2 Dana, (Ky.) 102; Crump *v.* Morgan, 3 Ired. Eq. (N. C.) 91; Foster *v.* Means, 1 Speer's Eq. (S. C.) 569; Farnshill *v.* Murray, 1 Bland, (Md.) 479; True *v.* Ranney, 1 Fost. N. H. 52; Keyes *v.* Keyes, 2 Fost. N. H. 558; Ward *v.* Duloney, 23 Missis. 410; Rawdon *v.* Rawdon, 28 Ala. 565.

[4] See authorities cited to preceding section.

[5] Shelf. Mar. and Div. 190; 1 Roper, Husb. and Wife, 389; Park on Dower, 16; 1 Bl. Com. 439.

the marriage contract, it must be shown to have existed at the time the contract was entered into. Subsequent insanity does not avoid it.[1]

19. It is also a well-established principle that no decree of nullity is necessary in cases either of idiocy or insanity, as preliminary to the right to insist upon the existence of the disability in any proceeding in which the question may legitimately arise. The question may be made and decided, in a proceeding for dower, for distribution, or in any other proceeding affecting rights or claims depending upon the validity or invalidity of the alleged marriage contract.[2]

20. A general discussion of the law relating to mental incapacity, and its proper application to the matrimonial contract, is foreign to the scope and purposes of this work. Questions as to the extent of mental unsoundness or imbecility necessary to disqualify a person from entering into the marriage contract; of the evidence requisite to establish that condition of the understanding; upon whom the burden of proof devolves; as to the effect of cohabitation, and recognition of the marital relation during lucid intervals; of temporary alienation of mind produced by excessive intoxication; and other questions of a kindred character, all of vital importance, and frequently extremely difficult of elucidation, have been treated at length, and with great learning and ability, in works specially devoted to the subject. To those works, and the reported cases cited in the note, the reader is referred for further information upon any or all of the questions thus arising.[3]

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[1] Shelf. Mar. and Div. 190; Bishop, Mar. and Div. § 180; Parnell v. Parnell, 2 Hagg. Con. R. 169; Page on Divorce, 185, note.

[2] 2 Kent, 76; Park, Dow. 17; Bishop, Mar. and Div. § 187; 2 Greenl. Ev. § 464; Wightman v. Wightman, 4 John. Ch. 343; Jacques v. The Public Admr., 1 Bradf. Sur. 499; Middleborough v. Rochester, 12 Mass. 363; Jenkins v. Jenkins, 2 Dana, 102; Foster v. Means, 1 Speer's Eq. (S. C.) 569; Johnson v. Kincade, 2 Ired. Eq. 470; Rawdon v. Rawdon, 28 Ala. 565.

By statute the rule is otherwise in Minnesota and Wisconsin, and a decree of nullity is necessary to avoid the marriage. So in New York; post, § 80.

[3] Shelf. on Lunacy, 2 Law Lib.; Stock on the Law of Non Compotes Mentis, 25 Law Lib.; Ray's Med. Juris. of Insanity; Wharton & Stillé's Med. Juris.; Shelf. Mar. and Div. 33 Law Lib. 199; Browning v. Reane, 2 Phill. 69, 70; Turner v. Meyers, 1 Hag. Con. R. 414; Portsmouth v. Portsmouth, 1 Hag. Ec. 355; Wheeler v. Alderson, 3 Hag. Ec. 574, 598; Kemble v. Church, 3 Hag. Ec. 278; Parker v. Parker, 2 Lee, 382; Middleborough v. Rochester, 12 Mass. 363; Anonymous, 4 Pick. 32; McElroy's case, 6 Watts & Serg. 451; Foster v. Means, 1 Speer's Eq. (S. C.) 569;

21. *Duress.*—As the free assent of the mind is essential to every contract, and constitutes its very essence, it follows that, where an apparent consent to a contract of marriage is the result purely of compulsion, fear, or violence, the material element to its validity is wanting, and it is therefore void. A marriage thus procured may be treated as null in every court in which its validity is drawn in question.[1] This doctrine, at one period, was a matter of controversy among the common law lawyers,[2] but it is now too firmly established upon authority to admit of serious question.

22. *Fraud.*—The law with reference to *fraud*, as affecting the marital contract, is in a condition of perplexing uncertainty.[3] Chancellor Kent pronounces marriages procured by fraud void *ab initio*, and places them in the same category with marriages induced by force.[4] Judge Reeve, in discussing the question, makes use of the following emphatic language: "A man, by the foulest fraud, gets into possession of the property of his neighbor. A contract thus basely obtained, is not only void, but in many instances the obtaining of it is a felony. The common sense of mankind must revolt at the idea, that when a man, by the same abominable fraud, obtained the person of an amiable woman, and her property, that the law should protect such contract, and give it the same efficacy as if fairly obtained. The truth is, that a contract which is obtained by fraud, is, in point of law, no contract. The fraud blots out of existence whatever semblance of a contract there might have been. A marriage procured without a contract can never be deemed valid. There is no more reason for sanctioning a marriage procured by fraud than one procured by force and violence. The consent is as totally wanting, in view of the law, in the former as in the latter case. The true point of light in which this ought to be viewed, I apprehend, is, that the marriage was void *ab initio;* but it is necessary to have a divorce

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Ward *v.* Duloney, 23 Missis. 410; Powell *v.* Powell, 27 Missis. 783; Clement *v.* Mattison, 3 Rich. (S. C.) 93; Pettitt *v.* Pettitt, 4 Humph. 191–3; Terry *v.* Buffington, 11 Geo. 337. The subject is also discussed at length by Mr. Bishop; Bishop, Mar. and Div. ch. 9.

[1] Rolle's Abr. Bar. and Feme, (A.) pl. 5; 4 Vin. Abr. p. 35, pl. 5; 1 Wood. Lect. 253; Shelf. Mar. and Div. 213; 2 Kent, 76, 77; Bishop, Mar. and Div. §§ 119–21; Park, Dow. 16; Amer. Jur. No. 39, p. 29; 2 Greenl. Ev. § 464; 2 Hagg. Con. R. 104, 246; Reeve's Dom. Rel. 41, 201.

[2] See note to pl. 5, p. 35, 4 Vin. Abr. tit. Bar. and Feme; Reeve's Dom. Rel. 201.

[3] Bishop, Mar. and Div. § 98, a.

[4] 2 Com. 76; Accord. Ferlat *v.* Gogin, 1 Hopk. 478; Perry *v.* Perry, 2 Paige, 501.

by the court, since the marriage has been celebrated, that all concerned may be apprised that such marriage has no effect."[1]

23. A recent writer, while noticing the uncertainty with which the subject is surrounded, and the conflicting opinions and observations in regard to it to be found in the books, nevertheless expresses his concurrence in the conclusion of Chancellor Kent and Judge Reeve, and gives it as his clear conviction that the result of the authorities is against the validity of marriages procured by fraud.[2] In some cases, no doubt, the application of this principle would be recommended by reason and strong natural justice. But it is exceedingly difficult to determine what elements of fraud should entitle the injured party to treat the marriage as void *ab initio*, and what should furnish ground for its dissolution merely.

24. It seems clear that fraudulent practices by either of the parties with reference to the character, fortune, or health of such party, do not render the marriage void.[3] So it is said a marriage which has been brought about by conspiracy is not for that reason void, if neither of the parties participated in the conspiracy.[4] It has been decided, also, that a marriage entered into for the purpose of injuriously affecting third persons in their property interests, is not void. As where a widow woman, having an interest in property determinable with her widowhood, married an intemperate man of no means, for the purpose of terminating her interest, and causing the estate to be immediately vested in her children, the object being to defeat a levy made at the instance of her creditors upon her interest in the estate, it was held that the marriage was nevertheless valid, although she refused to cohabit with the man she had married, and in fact never intended to cohabit with him.[5] It is likewise held that a false representation by a woman that she is a virgin, does not render void a marriage entered into upon the faith of such representation, even though it be shown that she has been a common prostitute.[6] And

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[1] Reeve's Dom. Rel. 206–7. See 2 Greenl. Ev. § 464.

[2] Bishop, Mar. and Div. §§ 98, a., 99.

[3] Ibid. § 100; 2 Kent, 77.

[4] Rex *v.* Birmingham, 8 B. & C. 29, 15 Eng. C. L. 151, 2 Man. & R. 280; Sullivan *v.* Sullivan, 2 Hagg. Con. R. 238, 246; Barnes *v.* Wyethe, 2 Williams, (Verm.) 41; Benton *v.* Benton, 1 Day, 111; Shelf. Mar. and Div. 215; Bishop, Mar. and Div. ch. 6.

[5] McKinney *v.* Clarke, 2 Swan, (Tenn.) 321.

[6] Perrin *v.* Perrin, 1 Add. Ec. 1; Reeves *v.* Reeves, 2 Phill. 125–7; Graves *v.* Graves, 3 Curtis, Ec. 325; Scroggins *v.* Scroggins, 3 Dev. 535; Bishop, Mar. and Div. § 105, and note.

the rule is the same as to a marriage induced by untruthful statements respecting the paternity of the child with which she is pregnant.[1]

25. It is indeed questionable whether the decided cases in the United States go further than to establish the doctrine, that a marriage procured by fraud may be dissolved upon the application of the party who has been deceived. There appears to be no case holding such a marriage *ipso facto* void.[2] Yet, as has been remarked, the opinions of those text writers who declare a marriage contract, resulting from deceitful practices and fraudulent contrivances, utterly and absolutely invalid, appear to be founded in sound reason, and the application of the rule, as claimed by them, would perhaps be attended with just results. In the Scotch law this doctrine appears to be well established.[3] But the *propriety* of a decree of nullity in such cases, that the invalidity of the marriage may be judicially ascertained, is so obvious as to require no further comment.

26. The question whether a fraudulent marriage is *ipso facto* void, or voidable only, is important in its connection with the law of dower. Where a divorce has been decreed by reason of the fraud, no difficulty arises, for in such case it is clear the right to dower does not exist. But if the marriage be voidable merely, and not void, then, as we have seen, in the absence of a decree during the lifetime of the parties, annulling the marriage contract, it stands as a good marriage, and gives the right of dower.[4]

27. There is a class of cases in which marriages, apparently regular in form, between parties laboring under no disability, have nevertheless, and with reason, been adjudged invalid. Thus, where a person is induced to go through the forms of a regular marriage, relying upon representations by the other party that the ceremony will not be binding, and the person thus imposed upon does not intend that it shall be followed by cohabitation, in all such cases, as no actual consent is given, the marriage is void.[5]

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[1] Moss *v.* Moss, 2 Ired. Law R. 55. See Scott *v.* Shufeldt, 5 Paige, 43.

[2] But see Ferlat *v.* Gogin, 1 Hopk. 478; Perry *v.* Perry, 2 Paige, 501.

[3] Allan *v.* Young, Ferg. Rep. 37; Stair, 1, 9, and 1, 10, 18, 3d par.; Ersk. 3, 1, 16; Ferg. Consis. Law, 107; 1 Fras. Dom. Rel. 234–87; Bishop, Mar. and Div. §§ 109–114. See, also, Shelf. Mar. and Div. 134, 187, 214.

[4] Ante, §§ 1, 2.

[5] See Clark *v.* Field, 13 Verm. 460; Mount Holly *v.* Andover, 11 Verm. 226; Robertson *v.* Cowdrey, 2 West. Law Jour. 191; 1 S. W. Law Jour. 167; Bishop, Mar. and Div. § 115.

28. *Error.*—Cases sometimes arise in which one of the parties to a marriage contract is mistaken or deceived as to the personal identity of the other. Upon this class of cases Chancellor Kent has the following observations: "It is said that error will, in some cases, destroy a marriage and render the contract void, as if one person be substituted for another. This, however, would be a case of palpable fraud, going to the substance of the contract; and it would be difficult to state a case in which error simply, and without any other ingredient, as to the parties, or one of them, in respect to the other, would vacate the contract."[1] Mr. Bishop expresses the following views upon the same subject:[2] "Inasmuch as there must be a consent in order to constitute marriage, if there is such a mistake in one or both of the parties, that the formal consent given does not apply to the person with whom the formal marriage is celebrated, then the marriage is a mere nullity; but if it does apply, then the marriage is good, unless fraud has entered into the matter of mistake, in such a way as to render it invalid on this ground." He also has the following observations, which are germain to the same subject: "If a person of bad character, to enter into a marriage, assumes the name of a person of good character, and the other party does not, therefore, marry the individual he intends, the marriage is a nullity. But if he marries the one he intends, it is good, though such one passes under an assumed name. In the latter instance there is consent to take the individual with whom the ceremony is performed; in the former there is not such consent."[3]

Marriage induced by duress, fraud, or through error, at the option of the injured party, treated as voidable only.

29. Judge Reeve, in his work on the Domestic Relations, lays down the following rule: "A woman who is by force carried away, and married against her consent, will not be entitled to dower, even if she afterwards consents to live with him who carried her away by force. A statute of Richard II. disables her from claiming dower. The real ground of her disability, I apprehend, is, that such marriage is void, notwithstanding some *dicta* to the contrary."[4] Mr.

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[1] 2 Com. 77.

[2] Bishop, Mar. and Div. § 116, a.

[3] Bishop, Mar. and Div. § 115; Rex *v.* Burton-upon-Trent, 3 M. & S. 537; Lord Stowell, in Heffer *v.* Heffer, 3 M. & S. 265; Clowes *v.* Clowes, 3 Curt. Ec. 185–91.

[4] Reeve's Dom. Rel. 41.

Lambert states the rule in the same way, and in nearly the same language.[1] This view appears to rest upon the theory that a contract supposed to be absolutely void in itself is utterly incapable of confirmation, and can not, like a contract which is merely voidable, be rendered valid at the option of the aggrieved party. But it would seem that the better rule is not to permit the party who has been guilty of the wrong to take advantage of it. Accordingly it is said that the party imposed upon may waive the wrong, and thereby render the marriage good.[2] And voluntary cohabitation after knowledge of the fraud or error, or after the cause of the fear is removed, amounts to such a waiver as will cure the defect.[3]

Statutes requiring a decree of nullity in certain cases.

30. By a statute of New York, already referred to,[4] it is provided that, "when either of the parties to a marriage shall be incapable, for want of . . . understanding, of consenting to a marriage, . . . or when the consent of either party shall have been obtained by force or fraud, the marriage shall be void from the time its nullity shall be declared by a court of competent authority."[5] If the plain letter of this and similar enactments be adhered to, it would seem that in the States where they are in force, marriages contracted with idiots, lunatics, or under duress, or through fraud, are valid to all intents, until dissolved by decree. In other words, the effect of the statute is to make them voidable only, and not void.[6] A similar law is in force in Wisconsin,[7] and probably in other States. Professor Greenleaf seems to have entertained the opinion that at common law a marriage claimed to be invalid on the ground of want of consent, will be held good, unless the subject has been investigated, and its invalidity established in a suit instituted for the purpose of annulling it;[8] but the authorities relied on by him do not appear to support this proposition.[9]

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[1] Lambert, Dow. 17.

[2] Bishop, Mar. and Div. § 122.

[3] Ibid. See The State *v.* Murphy, 6 Ala. 765; Scott *v.* Shufeldt, 5 Paige, 43; Ayl. Par. 361; Roger's Ec. Law, 2d ed. 643; 1 Fras. Dom. Rel. 229.

[4] Ante, §§ 7, 8.

[5] 2 Rev. Stat. N. Y. 139, § 4.

[6] Held otherwise as to a contract *de præsenti* with a lunatic; Jacques *v.* The Public Admr., 1 Bradf. Sur. R. 499.

[7] Wiscon. R. St. ch. 79, § 2. And also in Minnesota; Stat. Minn. (1849–58,) p. 463, § 2. See criticism of Mr. Bishop on this statute; Bishop, Mar. and Div. § 62, and note.

[8] 2 Greenl. Ev. § 464, note.

[9] See ante, §§ 21–25; Bishop, Mar. and Div. § 62, note.

Marriage within the prohibited degrees.

31. We have before observed that marriage within the prohibited degrees of affinity or consanguinity is voidable only, and not void, and such is the rule of the common law.[1] But in many, and probably most of the United States, such marriages, under some exceptions, are declared void by express statute.[2] In England, by statute of 5 and 6 Will. IV., chap. 54, all marriages solemnized after the 31st of August, 1835, within the prohibited degrees, either of affinity or consanguinity, are made absolutely void.[3] In the States where no change has been introduced by statute, the rule of the common law may be regarded as in force, and in those States, therefore, marriages within the prohibited degrees, unless dissolved by proper decree, will confer the right to dower.[4]

Marriage between whites and negroes.

32. In many of the States the amalgamation of the white and black races by marriage is looked upon as a violation of the first law of nature, and alliances of this kind are not only discountenanced by the courts, but are absolutely forbidden by law. Thus, in the case of Dupre *v.* Boulard,[5] where a marriage had been entered into in France between a free white person and a person of color, the court refused to sanction the marriage, and Spofford, J., in delivering the opinion of the court, used the following language: "Whatever validity might be attached in France to the singular marriage contract, and subsequent unnatural alliance there celebrated between the plaintiff and the deceased testatrix, it is plain that under the facts in evidence, the courts of Louisiana cannot give effect to these acts without sanctioning an invasion of the laws, and setting at naught the deliberate policy of the State." A statute of North Carolina prohibiting marriages between whites and persons of color, includes in the latter class all who are descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have

[1] Ante, § 4.

[2] 2 Kent, 82–85, and notes; Bishop, Mar. and Div. § 60, and ch. 12; 2 Greenl. Ev. § 464; 1 Hilliard, R. P. 129, § 26.

[3] For a table of the prohibited degrees, see Shelf. Mar. and Div. 169; Bishop, Mar. and Div. § 219, note.

[4] Adkins *v.* Holmes, 2 Carter's (Ind.) R. 197.

[5] Dupre *v.* Boulard, 10 La. Ann. 411.

been a white person.[1] Marriages of whites and blacks were forbidden in Virginia from the first introduction of blacks into that State.[2] And in California all marriages between whites and negroes or mulattoes are declared illegal and void.[3]

33. By the Massachusetts province law of 1705 no person of a Christian nation was permitted to marry a negro or mulatto. A marriage between a white person and a negro, Indian, or mulatto was also declared void by the act of 1786.[4] The revised statutes of 1836 in like manner forbid white persons from intermarrying with Indians, negroes, or mulattoes,[5] but this prohibition has since been repealed.

34. In Indiana, by a recent statute, a marriage, when one of the parties is a white person and the other is possessed of one-eighth or more of negro blood, is declared void.[6] The 13th article of the constitution of 1851 provides that no negro or mulatto shall come into or settle in that State; that all contracts made with those coming into the State contrary to such prohibition, shall be void; that to employ or encourage such negro to remain in the State shall be punishable by fine; that all such fines shall be appropriated to colonization; and that the General Assembly shall pass laws to carry these provisions into effect.[7] The General Assembly passed an act to enforce this article of the constitution, the 7th section of which reads as follows: "Any person who shall employ a negro or mulatto who shall have come into the State of Indiana subsequent to the thirty-first day of October, one thousand eight hundred and fifty-one, or shall hereafter come into the said State, or who shall encourage such negro or mulatto to remain in the State, shall be fined in any sum not less than ten dollars, nor more than five hundred dollars."[8] It was held in the Supreme Court of the State that these provisions extended to marriage contracts; and that consequently where a man of color who resided in the State at the time the new constitution took effect, entered into a marriage contract with a woman of color who subsequently moved into the State from Ohio, such marriage was absolutely void. "The marriage solemnized

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[1] State v. Walters, 3 Iredell, 455.

[2] 1 Hen. Stat. 146.

[3] Wood's Cal. Dig. 486, § 8.

[4] 2 Dane, 293.

[5] Rev. Stat. 1836, p. 475, § 5; p. 479, § 1. The latter section makes such marriages void without a divorce.

[6] 1 Rev. Stat. 1852, p. 361, § 2.

[7] 1 R. S. Ind. p. 67.

[8] 1 R. S. Ind. p. 375.

in Ohio County, Indiana," remarked the court, "is urged as an exception taking the case out of the statute. But such an exception can not be admitted, both because no such exception is recognized, either in the constitution or the law enacted to give it effect, and because the marriage itself, solemnized in contravention of both, must be regarded as void. Marriage in this State is but a civil contract. As such it is clearly embraced in the constitutional provision, copied into the subsequent law, which declares all contracts made with negroes and mulattoes coming into the State contrary to the provisions of the 13th article, void. The consequences are not a legitimate consideration for the courts. A constitutional policy so decisively adopted, and so clearly conducive to the separation and ultimate good of both races, should be rigidly enforced. So that Barkshire can claim nothing from the supposed relation of husband and wife. To give that relation any consideration favorable to him, would be to countenance an infraction of the fundamental law."[1]

Failure to observe statutory regulations.

35. Many of the States have prescribed certain regulations for the due solemnization of marriage; but as a general rule the non-observance of these does not render the marriage void, although the offender is commonly subjected to certain penalties as a punishment for the omission to fulfill their requirements. Consent of parents and guardians, where either of the parties is under a certain age, is usually required; a license must be obtained, or notice given by publication of the bans; the ceremony is directed to be performed either by a clergyman or some temporal authority named in the law. Sometimes, also, the ceremony must be performed in a certain locality, as in the township or county where the parties, or one of them, may reside, or over which the clergyman or other authority solemnizing the marriage has clerical or magisterial jurisdiction. These and like requisitions, are found in the statutes of many of the States.

36. The effect of these several statutory provisions has, to some extent, been incidentally considered and the American cases reviewed in the preceding chapters. In those States where a marriage entered into by mere words of present consent is held good, it is plain the absence of statutory formalities will not vitiate the contract. And

[1] Barkshire v. The State, 7 Porter's Ind. Rep. 389.

the general rule is that a marriage good at the common law, is good, notwithstanding the existence of any statute on the subject, unless the statute contain express words of nullity.[1] There are cases, however, in which it has been held that marriages not celebrated according to statutory requisitions, are for that reason void.[2] In some States, also, the statutes are imperative in form, and not directory merely, and it is absolutely essential to a valid marriage that their material requirements be strictly followed.

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[1] Bishop, Mar. and Div. §§ 167–75; 2 Kent, 85, 88–91; Reeve's Dom. Rel. 196, 200, 290; Londonderry *v.* Chester, 2 N. H. 268; Pearson *v.* Howey, 6 Halst. 12; Rodebaugh *v.* Sauks, 2 Watts, 9; Helffenstein *v.* Thomas, 5 Rawle, 209; The State *v.* Robbins, 6 Ired. 23; Newbury *v.* Brunswick, 2 Verm. 151; Dumaresly *v.* Fishly, 8 A. K. Marsh. 368; Hargroves *v.* Thompson, 31 Missis. 211; Park *v.* Barron, 20 Geo. 702; Goodwin *v.* Thompson, 2 Greene's (Iowa) R. 329; Parton *v.* Hervey, 1 Gray, 119; Hiram *v.* Pierce, 45 Maine, 367; Carmichael *v.* The State, 12 Ohio State, 553.

[2] Milford *v.* Worcester, 7 Mass. 48; Dunbarton *v.* Franklin, 19 N. H. 257; Brunswick *v.* Litchfield, 2 Greenl. 32; Ligonia *v.* Buxton, 2 Greenl. 102; The State *v.* Hodgskins, 19 Maine, 155; Bashaw *v.* The State, 1 Yerg. 177; Grisham *v.* The State, 2 Yerg. 589.

CHAPTER VIII.

OF MARRIAGES VOIDABLE IN LAW.

§ 1. Introductory.
2–10. Marriage within the age of consent.
11–17. When marriage within the age of consent confers dower.
§ 18. Impotence.
19. Effect of decree of nullity.
20–23. Rule as to foreign marriages.

1. But little need be added to what has been said in the preceding chapter respecting the nature of voidable marriages. In discussing the question as to what matters render a marriage void, it became necessary, to some extent, to consider and point out the distinction between void and voidable marriages, and to show what rights attach upon such marriages as are voidable only; particularly where no sentence of nullity has passed during the joint lives of the parties.[1] We have also seen, in that connection, that while the canonical disabilities of consanguinity or affinity, at common law render a marriage voidable merely, in many of the United States, marriages within the prohibited degrees are pronounced void by express statute.[2] We pass now to the consideration of other topics connected with the same general subject.

Marriage within the age of consent.

2. Marriages contracted within the age of consent are frequently spoken of as wholly void, and as conferring none of the civil rights of marriage;[3] but in reality they belong rather to the class of voidable marriages, and unless avoided by the parties upon arriving at the age of consent, are as good in law as if contracted between persons of the proper age. There is, however, this difference between marriages of this description and of the class usually denominated

[1] Chap. 7, §§ 1, 2.
[2] Chap. 7, § 81.
[3] See Elliott v. Gurr, 2 Phill. 16; 1 Eng. Ecc. 166, 168; Bishop, Mar. and Div. § 199.

voidable marriages, that in the latter a decree of a competent tribunal is necessary to dissolve the marriage, while in the former no such decree is necessary. The parties may, at the proper time, by their own act, disaffirm the contract, and will thereupon stand discharged from all its obligations.[1]

3. It has been stated that at common law the age of consent is fourteen for males and twelve for females.[2] "The full age of male and female, according to common speech," says Littleton, "is said the age of twenty-one years. And the age of discretion is called the age of fourteen years; for at this age, the infant which is married within such age to a woman, may agree or disagree to such marriage."[3] This language would appear to import that the age of consent, for both sexes, is fourteen; but Lord Coke, in commenting upon this section, says: "The time of agreement or disagreement, when they marry *infra annos nubiles*, is for the woman at twelve or after, and for the man at fourteen or after."[4] And Mr. Hargrave adds: "It seems more proper to consider *twelve* as the age of discretion for *women;* for Lord Coke himself, a few lines lower, states *that* to be *their* time for agreeing or disagreeing to a marriage."[5] This view has been generally concurred in, and the rule has become well established in the law.[6]

4. In many of the States the rule of the common law as to the age of consent has been considerably varied by statute, while in others that rule substantially remains in force.[7] But whatever may be the *age* of consent established by statute, it would seem, in the absence of any provision to the contrary, that marriages contracted within that age are subject to the same rule obtaining in that class of cases at common law; and that whatever rights are recognized at common law as attaching upon marriages within the age of consent, will also, as a general rule, be recognized and enforced in the several States where the only material change made by legislation is in

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[1] As to contracts of marriage *per verba de futuro*, where one of the parties is within the age of consent, and the other has attained that age, see post, § 7.

[2] Ante, chap. 3, § 3.

[3] Litt. sec. 104.

[4] Co. Litt. 79, a.; see, also, p. 33, a.

[5] Co. Litt. 79, a., note 8, 13 ed.

[6] Ayl. Parer. 361; Pool v. Pratt, 1 D. Chip. R. (2 Verm.) 252; 1 Bright, Husb. and Wife, 4; Arnold v. Earle, 2 Lee, 529; 1 Roper, Husb. and Wife, 335; 1 Bl. Com. 436; 2 Kent, 78; Bishop, Mar. and Div. §§ 191, 192; The Governor v. Rector, 10 Humph. (Tenn.) R. 57; Parton v. Hervey, 1 Gray, 119; Rex v. Gordon, Russ. & Ry. 48; Reeve's Dom. Rel. 200, 237.

[7] See 2 Kent, 79, notes; Reeve's Dom. Rel. 200, notes.

respect to the time when the parties are competent to contract matrimony.

5. Allusion has been made to the rule enabling either of the parties to affirm or disaffirm a marriage contract entered into within the age of consent.[1] Lord Coke, after stating the age of agreement or disagreement of the woman at twelve, and of the man at fourteen, adds: "And there need no new marriage if they so agree; but disagree they can not before the said ages, and then they may disagree and marry again to others without any divorce; and if they once after give consent they can never disagree after. If a man of the age of fourteen marry a woman of the age of ten, at her age of twelve he may as well disagree as she may, though he were of the age of consent; because in contracts of matrimony, either both must be bound, or equal election of disagreement given to both; and so *e converso*, if the woman be of the age of consent, and the man under."[2]

6. The rule thus succinctly stated needs little in the way of explanation or amplification. Either party may take advantage of the non-age of either, even though one of them may have been of full age at the time of the marriage; but neither can avoid the marriage by reason of such non-age until both have reached the age of consent. And so, when both parties have arrived at that age, they may affirm the contract, and it will thenceforth be binding upon them, and constitute a complete marriage. Evidence of such affirmance is furnished by their continued cohabitation; by sexual intercourse, or other acts clearly indicating a purpose on their part to regard each other as husband and wife.[3] But in England, by the marriage act of 26 Geo. II. c. 33, the agreement to affirm the contract would not be binding on the infant if the marriage was without bans, or by license and without consent of parent or guardian, unless the infant was a widow or widower.

7. To the rule allowing either party to disaffirm the contract by reason of non-age, there is this exception: Where a person of full age enters into a contract of marriage *per verba de futuro* with a

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[1] See ante, § 2, and post, §§ 15, 16.

[2] Co. Litt. 79, b.; see, also, p. 33, a.; 2 Kent, 78; Bishop, Mar. and Div. §§ 194, 195; Swinb. Spousals, 34; Reeve's Dom. Rel. 237; 1 Bl. Com. 436.

[3] Ayl. Parer. 250; 2 Dane's Ab. 301; Coleman's case, 6 N. Y. City Hall Recorder, 8; Com. Dig. Bar. and Feme, B. 5; Hubback on Succession, 272; Bishop, Mar. and Div. § 196.

person under the age of consent, the former is absolutely bound, and the contract is only voidable at the election of the infant.[1] "This doctrine of reciprocity," remarks Mr. Hargrave, "where one of the parties is an infant, or under the age of discretion, however true it may be in its application to actual marriages or to contracts of marriage *per verba de præsenti*, must not be considered as extending to other contracts with an infant, not even contracts of marriage *per verba de futuro;* for in them, the person of full age may, it is said, be bound at all events by our law, and yet as to the infant the contract may be voidable."[2] It would seem, therefore, that where a contract of marriage *per verba de futuro* is consummated by copula, though within the age of consent of one of the parties, the contract is voidable only at the election of such party.

8. A statute was enacted in New York, many years since, by which it was provided that where either of the parties to a marriage contract was incapable, by reason of want of age, from entering into such contract, it should be void only from the time its nullity was declared by a court of competent jurisdiction.[3] This law was substantially re-enacted in Wisconsin,[4] and perhaps in some other States. The effect of this legislation is to take from the parties to a marriage contracted within the age of consent, the right to disaffirm it by their own act, and compels them to resort to the courts for a decree of dissolution.

9. In the case of Goodwin *v.* Thompson,[5] a very interesting question, in regard to the effect of a statute fixing the age of consent at eighteen years in males and fourteen in females, was discussed and decided by the court. The point considered and determined was, whether the statute, by implication, abrogated the rule of the common law. It was held that it did not, but was merely cumulative thereto. "There is no prohibition of the marriage of a minor," say the court, "who may be under fourteen years of age, expressed. The statute is merely cumulative in its operation, and cannot have the effect of repealing the common law, so as to render the contract void. Such has been the decision of this court, as well as the courts

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[1] 2 Kent, 78.

[2] Harg. note, Co. Litt. 82, a. and b. 18 ed.; see, also, Holt *v.* Ward Clarencieux, 2 Str. 937; Contra, Swinb. Spousals, 86.

[3] 2 Rev. St. N. Y. 139, § 4. [4] R. S. Wisconsin, c. 79, § 2.

[5] Goodwin *v.* Thompson, 2 Greene's (Iowa) Rep. 329.

of last resort in nearly all the States of the Union, in declaring the effect of statutes similar to ours."[1]

10. A different conclusion appears to have been arrived at by the Supreme Court of Ohio sitting in bank. In the case of Shafher *v.* The State,[2] it was held by that court, under a statute almost identical with that of Iowa, that marriages contracted in Ohio by male persons under the age of eighteen, and female persons under fourteen, are invalid unless confirmed by cohabitation after arriving at those ages respectively. In that case Shafher, the plaintiff in error, at the age of sixteen, with the consent of his father, was married to one Elizabeth Emerick, with whom he lived and cohabited until he was nearly eighteen. Shortly before arriving at the age of eighteen he deserted his wife, married again, and continued to live with his second wife until after he arrived at that age. On a prosecution for bigamy, it was held that the first marriage being within the age of consent fixed by statute, and having been disaffirmed by the husband on arriving at that age, was of no validity, and consequently that the crime charged had not been committed. It appears to have been assumed, rather than decided, that the statute, by implication, repealed the common law, and herein lies the point of difference between the two courts.

By a statute of Arkansas, if the husband is under seventeen, or the wife is under fourteen, the marriage is void.[3]

When marriage within the age of consent confers the right to dower.

11. It is one of the peculiarities of the law of dower, that for the purposes of that estate, a marriage may be good although contracted before the age of consent, and although the husband die before having arrived at that age. This anomalous doctrine owes its existence to the favor with which the law regards the estate of dower.[4] Littleton says that the wife shall have dower of what age soever she be, "so as she be past the age of nine years at the time of the death of her husband, for she must be above nine years old, at the time of the decease of her husband, otherwise she shall not be endowed."[5] And Lord Coke adds: "Therefore if the wife be past the age of nine years at the time of the death of her husband, she shall be endowed,

[1] See, also, Parton *v.* Hervey, 1 Gray, 119; Bennett *v.* Smith, 21 Barb. 439.
[2] Shafher *v.* The State, 20 Ohio Rep. 1.
[3] Ark. Rev. St. 535. [4] Park, Dower, 17. [5] Litt. sec. 36.

of what age soever her husband be, albeit he were but four years old. *Quia junior non potest dotem promereri, neque virum sustinere; nec obstabit mulieri petenti minor ætas viri.* Wherein it is to be observed, that albeit *consensus non concubitus facit matrimonium*, and that a woman can not consent before twelve nor a man before fourteen, yet this inchoate and imperfect marriage, (from the which either of the parties of the age of consent may disagree,) after the death of the husband, shall give dower to the wife, and therefore it is accounted in law, after the death of the husband, *legitimum matrimonium*, a lawful marriage *quoad dotem.* If a man taketh a wife at the age of seven years, and after alien his land, and after the alienation the wife attaineth to the age of nine years, and after the husband dieth, the wife shall be endowed; for albeit she was not absolutely dowable at the time of the marriage, yet she was conditionally dowable, viz. if she attained to the age of nine years before the death of the husband, for so Littleton here saith, so that she pass the age of nine years at the death of her husband, for by his death the possibility of dower is consummate."[1]

12. In Fitzherbert's Natura Brevium the rule is thus stated: "A woman at the age of nine years or more, at the death of her husband, shall have dower of his land. And if she be of less age at the death of her husband, then she shall not have dower."[2] The same doctrine is stated in Bacon's Abridgment, with this reason regarding the requirement that the wife shall be nine years of age added: "The reason the law would not allow women before this age to demand dower, seems from their incapacity to have issue sooner. The support of the children is part of the consideration whereon this allowance of dower is founded; and as, on the one hand it would be unreasonable to extend it to such women as are incapable of performing the conditions; so on the other hand it would not be reasonable to exclude women of sufficient age, by reason of the incapacity of their husbands."[3] The same author remarks further: "If a man marries a woman of one hundred years old, and dies, she shall be endowed; for the law can not determine the precise time of the failure of her capacity to have issue, which may vary according to the strength and other circumstances of the woman."[4] And upon this subject, Lord Coke very gravely observes: "Albeit the wife be a

[1] Co. Litt. 33, a. [2] Fitzh. N. B. 149, L. [3] 2 Bac. Ab. 358 *et seq.*
[4] Ibid. See, also, to the same effect, 1 Roper on Husb. and Wife, 341.

hundred years old, or that the husband at his death was but four or seven years old, so as she had no possibility to have issue by him, yet seeing the law saith that if the wife be above the age of nine years at the death of her husband, she shall be endowed, and that women in ancient times have had children at that age whereunto no woman doth now attain, the law can not judge that impossible, which by nature was possible. And in my time a woman above threescore years old hath had a child, and *ideò non definitur in injure*. And for the husband being of such tender years, he hath *habitum*, though he hath not *potentiam* at that time, and therefore his wife shall be endowed."[1]

13. In 3 Dyer, 368, b., the following case is reported: A woman of full age contracted matrimony *per verba de præsenti* with a young man within the age of twelve years, and the marriage was solemnized in the face of the church. The married couple afterwards occupied the same bed together, but the husband died before arriving at the age of consent. Upon a claim for dower by the widow, she was met with a plea of *ne unques accouple*, and the question was propounded whether the ordinary ought to certify in favor of the legality of the marriage. The doctors to whom the question was referred, returned the following answer: "We are all of opinion, in this case, that she is to be accepted and taken for a lawful wife, and to be accoupled in lawful matrimony; and that the ordinary ought to so certify it, as the case is put touching dower; although otherwise they are *sponsalia de futuro*, yet in a cause of dower they shall be extended to be true matrimony *ratione privilegii*." Accordingly judgment was given in behalf of the demandant.[2]

14. There is not an entire concurrence in the opinion expressed by Lord Coke as to the right of the wife to dower where the husband dies under the age of seven years. It is laid down by some authors that if either party to a marriage is below that age, it is a mere nullity.[3] And it is maintained with much force that if we receive at all

[1] Co. Litt. 40, a. and b.; see, also, 1 Roll. Abr. 675, pl. 10; Doct. and Stud., Dial. 1, chap. 7; 2 P. Wms. 704; Leigh and Hanmer's case, 1 Leon. 52, 54.

[2] See pp. 305, 313 of the same volume, showing a controversy between the temporal and ecclesiastical courts respecting the form in which the certificate should be returned by the bishop.

[3] 2 Burn's Ec. Law, 434; Swinb. on Spousals, 20, 23; Chitty's Notes to 1 Bl. Com. p. 436, note 11; Bishop, Mar. and Div. §§ 194, 197. See, also, Bro. Dow. pl. 88, where it is said that if the feme is of the age of nine years, and the baron is not of seven years, she shall not have dower. Contra, if he is of seven years, at the time of his death; also, 13 Co. 20, Menvil's case.

the inability of boys and girls below seven years to enter into even an imperfect marriage, the result must follow that, while one of the parties is below seven, the marriage is completely null, whatever be the age of the other.[1]

15. We have quoted very freely from the old books such portions as have a direct bearing upon the subject now under consideration. Although there is some conflict of opinion as to the right of the wife to dower where either party is under the age of seven years at the time the marriage is contracted, there appears to be no question but that, by the common law, if the parties reach that age, and the wife live to the age of nine years, she is entitled to dower, although the husband die within the age of consent, and while the marriage, therefore, in the language of Lord Coke, is yet "imperfect and inchoate." How far this rule is to be considered as forming a part of the law of marriage in the United States, is a very difficult question to determine. Chancellor Kent, relying entirely upon the old common law authors above referred to, says that dower "belongs to a marriage within the age of consent, though the husband dies within that age;"[2] but it is believed there is not to be found in the whole range of American Reports a single adjudicated case authoritatively determining this question. It is very rarely indeed that a contract of marriage is entered into, in this country, by persons within the common law age of consent; and it would seem entirely safe to say that a female child of the tender age of nine years or under, was never yet offered nor taken in marriage in any part of the United States. A case is reported in New York, where a man contracted marriage with a girl under the age of twelve years; but she immediately declared her ignorance of the nature and consequences of the ceremony, and repudiated the connection, and upon a bill filed by her next friend, the Court of Chancery ordered her to be placed under the protection of the court as a ward, and prohibited the man from all intercourse or correspondence with her.[3]

16. It will be perceived that the solution of this question does not depend so much upon the point, whether a change by statute in the age of consent amounts to an abrogation of the common law in that particular, as upon the further question, whether the rule which invests with a right of dower the wife of a marriage entered into before

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[1] Bishop, Mar. and Div. § 197.

[2] 4 Com. 36.

[3] Aymar v. Raff, 3 John. Ch. 49.

the parties are by law competent to contract matrimony, and notwithstanding the husband dies before reaching the required age, forms a part of the common law of this country. By the common law of England, as we have seen, the age of consent for males is established at fourteen years, and for females at twelve years; and until they arrive at those ages respectively, they are considered absolutely incapable of contracting a perfect marriage. Yet if they actually enter into a marriage contract, the right to dower attaches, even though the husband die before attaining the age when, in law, he is competent to make the contract perfect and complete. So far as this doctrine is concerned, it is immaterial at what time the age of consent may be fixed by law. The right of dower is conferred as well by a marriage entered into before as after that period, and as well where the husband lives to the required age to affirm it as where he dies before it is reached. Yet there is an obvious propriety and justice in the rule, notwithstanding its anomalous character, and it may admit of serious question whether any attempt at its material modification, either by legislative or judicial authority, would not be productive of more harm than good. For example, in a number of States the age of consent is fixed at eighteen for males and fourteen for females. Suppose a marriage, regular in all respects, be entered into in good faith, by a young man in his eighteenth year, with a female of the legal age; that they assume all the duties and responsibilities of the marital relation, and cohabit as husband and wife, down to the period of the death of the husband, which occurs shortly before he becomes eighteen. Shall it be said that here was no marriage, and that the wife is not entitled to dower? And if this question be answered in the negative, where, in the absence of any statutory regulation upon the subject, and unless the rule of the common law be adopted, shall the line be drawn which is to distinguish—with respect to marriages contracted within the age of consent, and where the husband dies before arriving at that age—between marriages which confer upon the wife the right to dower, and those which do not? Some rule must be adopted and adhered to, and as that of the common law has the merit of being long established, well known, and understood, and not unreasonable in itself, there would seem to be no good reason for rejecting it, and substituting a new and perhaps uncertain one in its stead. The case decided in Iowa,[1] before referred

[1] Goodwin v. Thompson, 2 Greene's (Iowa) Rep. 329; ante, § 9.

to, proceeds upon the ground that the common law upon this subject is, in all respects, in full force in that State; and while the Ohio case[1] maintains that a change by statute in the age of consent abrogates the common law rule, in so far as to substitute the age fixed by statute for that established by the common law, it by no means is to be understood as denying to a marriage entered into within the statutory age, the right of dower, where the husband has died before arriving at that age without having done any act in disaffirmance of the contract, or manifested any disposition to deprive the woman he had sworn to cherish and protect, of that provision humanely intended by the law to furnish to her and her children sustenance and support after his death.[2]

17. The case of Bourne and Wife *v.* Simpson[3] bears, though somewhat remotely, upon this question. In that case certain parties had intermarried while they were both minors, the wife being about fifteen. She was possessed of property valued at $7000, the husband of property estimated at $60,000. During the coverture he was seized in fee simple of a tract of land which was afterwards, and during the coverture, regularly sold and conveyed under execution issued against him. The wife made no relinquishment to the purchaser of her dower in these lands. Subsequently a separation took place, and in 1840 proceedings for divorce and alimony were instituted by the wife, she then being about eighteen years of age, pending which, by consent of parties given in court, a decree was rendered for alimony, divesting the husband of all claim and interest, legal and equitable, which he might have by virtue of the marriage, in the real and personal estate of the father of the petitioner, and of a brother who had died without issue. The decree also gave her certain personal property, including such articles as she then had in possession. It was "further decreed and ordered, by consent of the said Margaret in open court, that the right, interests and property by the decree vested in her is accepted and received by her in lieu and satisfaction of all claims which she may have for dower, provision in alimony against her husband, or out of his estate of any kind whatever." The bill was continued so far as it prayed a divorce. With one exception, she received and used all the property mentioned

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[1] Shafher *v.* The State, 20 Ohio Rep. 1; ante, § 10.

[2] See Parton *v.* Hervey, 1 Gray, 119.

[3] Bourne and Wife *v.* Simpson, 9 B. Mon. (Ky.) Rep. 454.

in the decree. Before she reached full age, the husband filed his bill for divorce, which was granted, and the wife was afterwards twice married. The first husband having deceased, the wife and her then husband commenced a suit for her dower in the lands of the former, sold on execution during the coverture, as before mentioned, and in support of this claim it was urged—1. That the decree of divorce could not in any way impair the right to dower; 2. That any consent she might have given to the decree entered in the proceeding instituted by her for divorce and alimony could not bind her, for two reasons: First, because she was an infant at the time; and secondly, because no agreement after marriage, made with the husband, can have any effect to bar or defeat the right to dower. The court decided against the claim, holding that the provision made by the decree for the wife was in lieu of dower; that such a decree against an infant feme covert, though rendered with her consent, was not legal, but subject to reversal; yet that it was not void, and so long as it stood unreversed was binding upon her. It was also held that the facts and circumstances of the case showed that she had acquiesced in the decree after she became of age.

Impotence.

18. Impotence is defined by Mr. Shelford to "consist in the incapacity for copulation, or in the impossibility of accomplishing the act of procreation."[1] The definition given by Fraser is substantially the same.[2] Mr. Bishop regards the following as a better definition: "Impotence is such an incurable incapacity as admits of neither copulation nor procreation."[3] It is not necessary, however, to enter upon the details of this subject, inasmuch as it is admitted on all hands that impotence does not render a marriage void, but voidable only, and consequently, unless sentence is passed during the lifetime of both the parties, the marriage, notwithstanding this impediment, is good.[4]

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[1] Shelf. Mar. and Div. 202.

[2] Fras. Dom. Rel. 53.

[3] Bishop, Mar. and Div. § 228.

[4] Ibid. § 260; Poynter, Mar. and Div. 128; Elliott *v.* Gurr, 2 Phillim. 16, 19; 1 Eng. Ec. 166–8; Sneed *v.* Ewing, 5 J. J. Marsh. (Ky.) 460. See, as to voidable marriages, ante, ch. 7, §§ 1, 2, 4. Upon the subject of impotence generally, see Bishop, Mar. and Div. ch. 14; Shelf. Mar. and Div. 201 *et seq.*, and authorities there cited.

Effect of a decree annulling a voidable marriage.

19. Whenever a marriage, by reason of any pre-existing impediment, is regarded as *voidable* by the law, a sentence annulling the marriage *for such cause* makes it void *ab initio*, and consequently defeats all claim to dower founded thereon.[1] *Impotence* is a disability of this character, and although it is mentioned in the statutes of most of the States as a ground of *divorce*, and it is not declared whether the decree shall operate to annul the marriage as from the beginning, or only as from the date of its rendition, it seems clear that upon principle it comes within the rule applicable to other voidable marriages.[2] The doctrine is the same where *fraud* is made a ground of divorce. It should be remembered, however, that the decree, in order to have this effect, must be founded upon one of the causes which render a marriage voidable; for if a divorce be granted for matter arising subsequent to the marriage contract, that does not render the marriage void *ab initio*, but dissolves it from the date of the decree only, although there may have been good cause, by reason of some pre-existing disability, to annul the marriage as from the beginning.[3]

Foreign marriages.

20. It is a general principle of international law, that marriages celebrated in a foreign country or state, according to the laws of such country or state, shall be held and treated as good and legal marriages everywhere.[4] It is equally well settled as a general propo-

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[1] Park, Dow. 19; Kenn's case, 7 Co. 140, 43, b.; Roll. Abr. tit. Dow. (R.) pl. 1–5; 9 Vin. Abr. 252, tit. Dow. (R.) pl. 1–5; Co. Litt, 32, a., 33, b.; Jenk. 44; Shelf. Mar. and Div. 433–4; 1 Bl. Com. 434; Bishop, Mar. and Div. §§ 46, 58–59, 285; Aughtie *v.* Aughtie, 1 Phill. 201; Perry *v.* Perry, 2 Paige, 501.

[2] Bishop, Mar. and Div. § 261.

[3] See Park, Dow. 20; Rennington *v.* Whithipole, referred to in Howard *v.* Bartlet, Hob. 181; cited, Vaughan, 249, 322, 9 Vin. Abr. tit. Dow. (R.) pl. 4.

[4] Story, Confl. Laws, §§ 79–81; 2 Kent, 92; Park on Dower, 21; Bishop, Mar. and Div. § 125 *et seq.*; Compton *v.* Bearcroft, Bul. N. P. 114; Sutton *v.* Warren, 10 Met. 451; Commonwealth *v.* Hunt, 4 Cush. 49; Swift *v.* Kelly, 3 Knapp, 257; Lacon *v.* Higgins, 3 Stark. 178; Morgan *v.* McGhee, 5 Humph. 13; Wall *v.* Williamson, 8 Ala. 48; Patterson *v.* Gaines, 6 How. U. S. 550; Phillips *v.* Gregg, 10 Watts, 158; Fornshill *v.* Murray, 1 Bland, 479; 2 Roper, Husb. and Wife, 496; The State *v.* Patterson, 2 Ired. 346; Hiram *v.* Pierce, 45 Maine, 367.

sition, that a marriage invalid where it is celebrated is everywhere invalid.[1]

21. In England, doubts have been entertained of the validity of marriages celebrated in Scotland according to the laws of that country, between persons who go there from England to evade the provisions of the Marriage Act.[2] And in the United States there is a reported case in which it was held that if parties domiciled in one State where, under a decree of divorce, they are prohibited from marrying again, go into another State for the purpose of evading the law of their domicile, and there contract marriage, such marriage is void.[3] But this doctrine is opposed by several cases, in which the precise contrary was held.[4] In Massachusetts, since the decisions referred to in the note were made, the rule has been so modified by statute as to conform to the doctrine of the case of Williams *v.* Oates.[5]

22. To the general rule that marriages good by the laws of the country where solemnized are good everywhere, there are some exceptions, among which incest and polygamy are regarded as the principal.[6] The question, however, as to what marriages are incestuous by the law of nature, is full of difficulty. It is quite certain that all marriages between persons in the lineal ascending and descending degrees of blood relationship, and between brothers and sisters in the collateral line, whether of the whole or the half blood, are within the prohibition.[7] But connections in the collateral line of consanguinity, between relatives further removed than brother and sister, are not deemed incestuous by natural law.[8] Another

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[1] Bishop, Mar. and Div. § 132; Greenwood *v.* Curtis, 6 Mass. 358, 378; Dalrymple *v.* Dalrymple, 2 Hag. Con. R. 54; Kent *v.* Burgess, 11 Sim. 361; McCulloch *v.* McCulloch, Ferg. 257. See, also, the cases cited in the preceding note.

[2] Park on Dower, 22; Ilderton *v.* Ilderton, 2 H. Bl. 145; Robinson *v.* Bland, 2 Burr. 1080, 1 W. Bl. 259; Conway *v.* Beazley, 3 Hag. Ec. R. 639. But see Compton *v.* Bearcroft, Bull. N. P. 118; and *ex parte* Hall, 1 Ves. & Bea. 112.

[3] Williams *v.* Oates, 5 Ired. L. (N. C.) 535.

[4] Medway *v.* Needham, 16 Mass. 157; Putnam *v.* Putnam, 8 Pick. 433; Cambridge *v.* Lexington, 1 Pick. 506; Dickson *v.* Dickson, 1 Yerger, 110.

[5] Ante, ch. 7, § 15.

[6] Story on Confl. Laws, § 113, a.; Bishop, Mar. and Div. § 130.

[7] Bishop, Mar. and Div. § 131; Story, Confl. Laws, § 114; 2 Kent, Com. 88; 1 Burge, Col. and For. Laws, 188.

[8] Sutton *v.* Warren, 10 Met. 451; Wightman *v.* Wightman, 4 John. Ch. 343; Bishop, Mar. and Div. § 131. In a recent English case it was held that where a man domiciled in England married abroad a sister of his deceased wife, the marriage being

exception to this rule is where persons destitute of sufficient mental capacity enter into a marriage contract abroad. Such a contract, if invalid by the law of the domicile, would be so treated at home, although deemed valid by the law of the country where it was celebrated.[1]

23. There are also certain exceptions to the general rule that marriages invalid where celebrated are invalid everywhere. They are briefly stated by Mr. Bishop as follows: "First: Cases in which the parties cannot contract marriage in accordance with the local law where they are. Secondly: Those wherein, on various grounds, a local law has sprung up in the foreign country, applicable to sojourners from other countries, under which they are married, differing from the general *lex loci contractûs*, yet recognized as well by it, as by the law of their domicile. To which may be added, Thirdly, The case . . . . of a victorious invading army carrying with it the laws of its own country, for the protection of persons within its lines and general range of dominion."[2]

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good in the country where it was celebrated, could not be recognized as valid in England, on the ground that it was incestuous by the laws of God. Brook *v.* Brook, 3 Smale & G. 481. See remarks of Mr. Bishop on this case, Bishop on Mar. and Div. 3d ed. § 131, a. See, also, dictum of Lord Brougham in Warrender *v.* Warrender, 9 Bligh, 89, 112; S. C. 2 Clark & Fin. 488, 531.

[1] Bishop, Mar. and Div. § 130; True *v.* Ranney, 1 Fost. N. H. 52.

[2] Bishop, Mar. and Div. § 133. See, also, Ruding *v.* Smith, 2 Hag. Con. R. 371; Rogers' Ec. Law, 652; Kent *v.* Burgess, 11 Sim. 361; Lord Clancurry's case, Cruise on Dignities, 276; Lloyd *v.* Petitjean, 2 Curt. Ec. 251; Calvin's case, 7 Co. 1, 17, b.; Campbell *v.* Hall, Cowp. 204, 209; Rex *v.* Brampton, 10 East, 282, 288; Fowler *v.* Smith, 2 Cal. 39; Poynter, Mar. and Div. 289; Woodd. Dig. 238, note; 1 Burge, Col. and For. Laws, 199; 2 Roper, Husb. and Wife, 497; Shelf. Mar. and Div. 78–87.

CHAPTER IX.

ALIENAGE OF THE HUSBAND OR WIFE AS AFFECTING THE RIGHT OF DOWER.

§ 1. Introductory.
2, 3. Alienage at common law.
4. Naturalization and denization at common law.
5, 6. Alienage in the United States.
7–50. In the several States.
51. In the District of Columbia.
§ 52. American statutory modifications of the common law considered.
53. Naturalization in the United States.
54–58. Naturalization in the United States prospective only.
59–61. What persons can not become citizens.

1. In pursuing our inquiries upon that branch of the law which relates to the legal capacity of the demandant to take and enjoy the estate of dower, and the personal disabilities which, in some instances, prevent it from attaching, our work would be but imperfectly performed, did we omit to notice the disqualification arising from *alienage*, which, established at a very early date, continues, though in a somewhat modified form, to exist in England, and in several of the American States.

Alienage at common law.

2. An alien is defined, in general terms, to be one who is born out of the allegiance of the king or commonwealth.[1] By the common law a person laboring under this disability is incapable of acquiring title to real property by descent, nor can he acquire any other right in lands by title created by mere operation of law. If an alien purchase land, or if land be devised to him, the general rule is that he may take and hold the estate until an inquest of office had; but upon his death, it would instantly and of necessity, without any inquest of office, escheat to and vest in the State, because he is incom-

[1] Com. Dig. tit. Alien, A.; 1 Inst. sec. 198; Wood's Inst. 23; Calvin's case, 7 Co. 16, a.; Ainslie *v.* Martin, 9 Mass. 454, 459; Martin *v.* Woods, Ibid. 377; Jackson *v.* Burns, 3 Binney, 75; Dawson *v.* Godfrey, 4 Cranch, 321; Lambert's Lessee *v.* Paine, 3 Ibid. 97; Kelly *v.* Harrison, 2 John. Cas. 29, 32, note; 2 Kent, 50.

petent to transmit by hereditary descent.[1] The reasons for not admitting aliens to the privileges of citizens are thus stated by Lord Coke: 1. The secrets of the realm might thereby be discovered. 2. The revenues of the realm, (the sinews of war, and ornament of peace,) should be taken and enjoyed by strangers born. 3. It should tend to the destruction of the realm. Which three reasons, he adds, do appear in the statute of 2 H. 5 Cap. and 4 H. 5 Cap.[2]

3. As the estate of dower is created by mere operation of law, it follows as a natural sequence to the premises above stated, that an alien can not take as tenant in dower. Accordingly we find it laid down as an established rule in the common law, that "if a man taketh an alien to wife and dieth, she shall not be endowed." So, also, "if the husband be an alien, the wife shall not be endowed."[3] This stern rule of the common law was somewhat relaxed, in the time of Henry V., by an act of Parliament, under which alien women who from thenceforth should be married to Englishmen by license of the king, were enabled to demand their dower after the death of their husbands in the same manner as Englishwomen;[4] but the rule in England, in other respects, continued without any material change until a comparatively recent date. By the statute of 7 & 8 Victoria, chapter 66, it is provided that foreign women, married to British subjects, shall thereby become naturalized. And as the effect of naturalization is to remove the disability resulting from alienage, the consequence is that, under this statute, alien women married to British subjects are not debarred, by reason of their alienage, from the enjoyment of the estate of dower. But this act does not appear, by its terms, to extend to cases where the husband is an alien and

[1] 2 Kent, 53, 54; Calvin's case, 7 Co. 25, a.; 1 Ventr. Rep. 417; Page's case, 5 Co. 52, a.; Collingwood v. Pace, 1 Sid. Rep. 193; S. C. 1 Lev. Rep. 59; Plowd. Rep. 229, b. 230, a.; Co. Litt. 2, b.; Fox v. Southack, 12 Mass. 143; Fairfax v. Hunter, 7 Cranch, 603, 619, 620; Orr v. Hodgson, 4 Wheat. 453; Governeur v. Robertson, 11 Ibid. 332; University v. Miller, 3 Dev. 192, 196; Montgomery v. Darion, 7 N. H. 475; People v. Folsom, 5 Cal. 373.

[2] Calvin's case, 7 Co. 18, b.

[3] Co. Litt. 31, b.; 32, a.; Jenk. Cent. 1, Ca. 2; 2 Saund. 46, n. 5; 2 Bl. Com. 131; 1 Bac. Ab. 185, tit. Aliens; 9 Viner's Ab. 211, tit. Dower, pl. 12; Park on Dower, 228, 229; 1 Greenl. Cruise, 173, §§ 29, 30; 2 Kent's Com. 54; 4 Ibid. 36; Lambert on Dower, 15; Calvin's case, 7 Co. 25, a. and b.; 1 Ventr. 417; Molloy, 364; Lord Fairfax's case, 7 Cranch, 629.

[4] Co. Litt. by Harg. & Butler, 31, b., n. 9; 1 Thomas' Coke, 572, n. 15; 2 Danv. 652, pl. 3; 9 Viner's Ab. 210, 211, tit. Dower, pl. 3, 4; Park on Dower, 228; 1 Bac. Ab. 186, tit. Aliens, note.

the wife a subject of the British crown, and as to this class of cases, therefore, the rule as stated by Lord Coke remains in substance unchanged.

Effect of naturalization and denization at common law.

4. To the general rule that an alien was incapable of becoming a tenant in dower, the common law annexed the important qualification that naturalization by act of Parliament, or denization by letters patent from the king, should remove the disability, and permit the estate to attach.[1] According to the principles of the English law, if an alien be naturalized by act of Parliament he is put in exactly the same condition, except as to eligibility to office, as if he had been born in the dominions of the king, and in all respects inherits like a natural-born subject.[2] And, under the theory of the English constitution, which confers upon Parliament powers almost omnipotent in their character, the retrospective energy of an act of naturalization is such that it relates back to the period of the birth of the party, and consequently where an alien wife is naturalized she is thereby rendered dowable of all lands of which her husband was seized during the coverture, including those conveyed by him before her incapacity was removed.[3] But with *denization* the effect is different. A denizen occupies a kind of middle state between an alien and a natural-born subject, and partakes of the characteristics of both.[4] And although by denization the disability to take as tenant in dower is removed, nevertheless the right operates prospectively only, and is confined to such lands as were held by the husband at the time the wife became a denizen, and such as he may thereafter acquire. As to all lands aliened by the husband prior to the denization of the wife, no right of dower attaches; "for," says Lord Coke, "she was absolutely disabled by the law, and by her birth not capable of dower, but her capacity and ability began only by her

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[1] Co. Litt. 33, a.; Menvil's case, 13 Co. 23; Jenk. Cent. 1, case 2; 8 Petersd. Abr. 478; 9 Vin. Ab. 212, pl. 19; Park, Dow. 228.

[2] Co. Litt. 129, a.; 1 Bac. Ab. tit. Alien, b.; 2 Bl. Com. 250; 1 Ibid. 184.

[3] Co. Litt. 33, a.; 9 Vin. Abr. 212, pl. 19; 1 Bl. Com. 374, note 21; Park, Dow. 228; 1 Greenl. Cruise, 174, § 30.

[4] 1 Bl. Com. 374; 11 Co. 67.

denization."[1] In the United States the general doctrine is, that naturalization under the laws of Congress has an effect similar to that created in England by denization. It does not possess, in the estimation of our courts, the retroactive power attributed to the acts of the Parliament of Great Britain.[2]

Alienage as a ground of disability in the United States.

5. At one period in the history of our country, many interesting questions respecting rights of citizenship and of property, growing out of the anomalous condition of things produced by the war of the Revolution and the recognition of American independence by the British government, were presented to our courts for judicial determination. Thus, in Ainslie *v.* Martin,[3] a person born in the colonies voluntarily withdrew into other parts of the British dominions before our independence was established, and never returned. The question afterwards arose whether he was to be considered a subject to the State in which he was born, and it was determined in the affirmative, upon the ground that his allegiance accrued to the State as the lawful successor of the king. A contrary doctrine had been held by the same court in the cases of Gardner *v.* Wood and Kilham *v.* Ward,[4] and was afterwards asserted in the case of Phipps.[5] The view of these earlier cases is also fairly deducible from the discussion in McIlvaine *v.* Coxe,[6] and Chancellor Kent considers it the more reasonable doctrine that no *antenatus* ever owed allegiance to the United States, nor to any individual State, provided he withdrew himself from this country before the establishment of our independent government, and settled under the king's allegiance in another part of his dominions, and never afterwards, prior to the treaty of peace, returned and settled here.[7] Where a native of Great Britain, a sol-

[1] Menvil's case, 13 Co. 23; Co. Litt. 33, a.; Jenk. Cent. 1, Ca. 2; 8 Peterad. Ab. 478; 9 Viner's Ab. 212, pl. 19; 1 Bl. Com. 374, n. 21; 1 Greenl. Cruise, 174, § 30; Park on Dower, 228.

[2] See post, § 54 *et seq.*

[3] Ainslie *v.* Martin, 9 Mass. 454.

[4] Gardner *v.* Wood, 2 Mass. 244, note; Kilham *v.* Ward, 2 Mass. 236.

[5] Case of Phipps, 2 Pick. 394, note.

[6] McIlvaine *v.* Coxe, 2 Cranch, 280; 4 Ibid. 209.

[7] 2 Com. 40; Respublica *v.* Chapman, 1 Dallas, 53; Jackson *v.* White, 20 John. 313; Calais *v.* Marshfield, 30 Maine R. 511; see, also, Inglis *v.* The Trustees of the Sailor's Snug Harbor, 3 Peters' U. S. Rep. 99, 122, 128.

dier in the British army, deserted from that army during the war of the Revolution, and was domiciled in Connecticut at the period of the treaty with Great Britain by which the independence of the United States was acknowledged, it was held that he thereby became a citizen of the United States.[1] These, and questions of a kindred character, though invested with much interest at the period when they arose, have, in the progress of time, become of but little practical importance. The rights of property, as affected by discordant claims springing from questions of allegiance to the old government or to the new, have been, in a great measure, adjusted. It is very rarely, though it sometimes occurs, that a case arises involving the consideration of these questions, or any necessity for their determination. The provision of the treaty of 1794 between the United States and Great Britain, by which British subjects were confirmed in the titles which they then held to lands in this country, and as to those lands were not to be regarded as aliens, was also temporary in its character, inasmuch as it applied only to titles existing at the time the treaty was made. At this day it is regarded in a measure as obsolete.[2]

6. In the United States an alien is defined to be a person born out of the jurisdiction and allegiance of the Federal government.[3] But by act of Congress of February 10th, 1855, any person born out of the limits and jurisdiction of the United States, whose father, at the time of the birth of such person, was a citizen of this country, shall be deemed and is declared a citizen of the United States. It is provided, however, that the rights of citizenship shall not extend to any person whose father never resided in the United States.[4] Congress, by legislation, has provided the mode and directed the manner in which aliens may become naturalized, and thereby admitted to the rights of citizenship.[5] It has also, to some extent, abrogated the senseless rule of the common law affecting the legal status and marital rights of alien women who are married to citizens of the United States. But, as a general rule, the rights and privileges of

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[1] Hebron *v.* Colchester, 5 Day, 169. See, upon this subject, 2 Kent's Com. 39–50, and note to Kelly *v.* Harrison, 2 John. Cas. 29, 31.

[2] 2 Kent, 69.

[3] Ibid. 50; see Ainslie *v.* Martin, 9 Mass. 454; Martin *v.* Woods, Ibid. 377.

[4] 10 Stat. 604, § 1; Brightly's Dig. 182.

[5] See 2 Kent, 51–53, where most of these acts are referred to, and their various requirements pointed out and discussed.

aliens within the several States, while they continue to hold that relation, particularly with reference to interests in real estate, are made the subject of statutory regulations in those States respectively. It is to these regulations, as well as to some portions of the acts of Congress above referred to, and some of the adjudicated cases bearing thereon, that it is now proposed to invite the attention of the reader.

7. *Arkansas.*—By the act of 1837, in force in Arkansas, all aliens residing in that State who have made declaration according to law of their intention to become citizens of the United States, are made capable of taking by deed or will any estate in lands, and of holding, aliening, or devising the same; and upon the decease of any alien having title to lands according to that act, his estate shall pass and descend in the same manner as if he were a citizen of the United States; and it shall be no objection to the husband, widow, or kindred of such alien, or of any citizen deceased, taking lands by virtue of the law regulating the distribution of intestates' estates, that they are aliens, if at the time of the death of the intestate they reside within the limits of the United States.[1]

The act regulating dower provides that "the widow of an alien shall be entitled to dower of the estate of her husband, in the same manner as if such alien had been a native-born citizen of this State."[2]

8. *Alabama.*—It has been held in Alabama that the wife of an alien, though herself an American citizen, is not dowable of his lands.[3] The following provisions are contained in the Code of 1852:—

§ 1580. When the next of kin of the intestate are incapable of inheriting, from alienage, the estate descends to the nearest of kin of the intestate, who is a citizen of the United States.

§ 1591. Any estate, or interest in real property, devised to a person or corporation incapable of taking, descends to the nearest of kin capable of taking, or if he have no heirs competent to take, to the residuary devisee, if any be named in the will capable of holding such estate or interest; otherwise to the husband or wife; otherwise to the State.

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[1] Rev. Stat. ch. 7, § 1; Dig. of Stat. (1848,) 149; Dig. of Stat. (1858,) p. 145.

[2] Rev. Stat. 1837, ch. 52, § 2; Dig. of Stat. (1848,) p. 444; Dig. of Stat. (1858,) p. 451.

[3] Congregational Church v. Morris, 8 Ala. 182. See, also, Jinkins v. Noel, 3 Stew. 60; Smith v. Zaner, 4 Ala. 99; State v. Primrose, 3 Ala. 546; Etheridge v. Malempre, 18 Ala. 565.

9. *Connecticut.*—The Compiled Statutes of 1854 contain the following provisions:—

§ 6. Any alien who is a resident of this State or of any of the United States, may purchase, hold, inherit or transmit real estate in this State, in as full and ample a manner as native born citizens; and the wife of any alien capable of holding land in this State, may take and hold land in this State by devise or inheritance, and shall be entitled to dower in the land of her deceased husband; and the children and other lineal descendants of any person capable of holding lands in this State, may take and hold such land as heirs at law of such ancestor.

§ 7. All conveyances and transfers of real estate, or of any interest therein, by deed, devise or otherwise, heretofore made to any foreigner not authorized by law to hold real estate, and all conveyances and transfers of the same by such foreigner, are confirmed to such foreigner, his heirs or assigns, and made effectual to all intents and purposes, as though such foreigner had been a native born citizen.[1]

10. *California.*—By the constitution of California, foreigners who are *bona fide* residents of the State may enjoy the same rights in respect to the possession, enjoyment, and inheritance of property as native-born citizens.[2] By the act of April 19, 1856, aliens are permitted to inherit and hold by descent in as full a manner as though they were native-born citizens of the State or of the United States; provided, that no non-resident foreigner shall take and enjoy any real estate within the limits of the State after five years from the time he shall inherit the same; but in case he do not appear or claim the estate within that period, then it shall be sold, and the proceeds held for the benefit of the non-resident or his legal representatives, to be paid within five years thereafter upon demand, and the production of satisfactory evidence of his or their right thereto. In the event that no proper claim to the fund is made within the extended term of five years, it becomes the property of the State.[3]

11. *Delaware.*—By the Revised Code of 1852, aliens are permit-

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[1] Comp. Stat. Conn. 1854, p. 630. For former laws, see Stat. Conn. 1838, p. 287; Rev. Stat. 1849, tit. 29, ch. 1, § 6. In Sistare *v.* Sistare, 2 Root, 468, decided in 1796, dower was refused to the alien widow of a naturalized foreigner who had died intestate; but the decision was placed upon the ground that she was willfully absent from him without his consent, she having remained in a foreign country. See, also, Whiting *v.* Stevens, 4 Conn. 44.

[2] Art. 1, § 17.

[3] Wood's Cal. Dig. 427, Art. 2366. See Ramires *v.* Kent, 2 Cal. 558; People *v.* Folsom, 5 Cal. 373; Siemmessen *v.* Bofer, 6 Cal. 250; Farrell *v.* Enright, 12 Cal. 450; State *v.* Rogers, 18 Cal. 159.

ted to purchase and hold real estate after having made a declaration of their intention to become citizens. So, also, they may take by descent, provided they are residents of the United States at the death of the intestate; and an alien widow residing in the United States at the death of her husband is entitled to dower.[1] The foregoing provisions are made retrospective to January 22, 1811.[2]

12. *Florida.*—Aliens of any country or nation whatever may purchase, hold, sell, convey, or devise any lands and tenements in this State, to the same extent and with the same right as citizens of the United States. In making title by descent, it shall be no bar to a party that any ancestor, through whom he derives his descent from the intestate, is or hath been an alien.[3]

13. *Georgia.*—Any adult male alien resident of the State, who has given notice of his intention to become a citizen of the United States according to the acts of Congress, is authorized to receive, purchase, and hold real estate as fully and completely as if he were a citizen of the United States, and after he shall have become a citizen by taking the oath of allegiance in the manner prescribed by the acts of Congress, he is authorized to convey, devise, or mortgage his real estate, or any part thereof.[4] Adult female aliens and minor aliens becoming residents of the State, are authorized to receive, purchase, and hold real estate; and the former may convey, devise, or mortgage the same without restriction, and with the same powers as to the disposal thereof, as males when they become citizens of the United States.[5] In case of the death of any male alien before perfecting his right to citizenship, his real estate does not escheat, but is to be disposed of according to the provisions of the statute relating to the devise or descent of land to aliens.[6]

14. *Illinois.*—Aliens may acquire, hold, and dispose of real estate, and transmit the same by descent, in this State, precisely as natural-born citizens of the State or of the United States may do.[7] It is also provided that "the widow of an alien shall be entitled to dower

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[1] Rev. Code 1852, ch. 81, § 1. [2] Ibid. § 2.

[3] Acts of Nov. 17, 1829, and February 17, 1838; Thompson's Dig. p. 190.

[4] Act of Dec. 21, 1849, § 1; Cobb's New Dig. 367.

[5] Act of Dec. 21, 1849, § 2; Cobb's New Dig. 368.

[6] Ibid. § 3. For the law referred to in this section, see Cobb's New Dig. 253; Act of Dec. 15, 1810.

[7] Act of Feb. 17, 1851; 2 Stat. Ill. (1858,) p. 815.

of the estate of her husband in the same manner as if such alien had been a native-born citizen of the United States."[1]

15. *Indiana.*—The Revised Statutes of 1852 provide that

No person except a citizen of the United States, or an alien who shall be at the time a *bona fide* resident of the United States, shall take, hold, convey, devise, or pass by descent, lands, except in such cases of descent or devise as are provided for by law.

Sec. 3. No title of any resident inhabitant of this State, who was in actual possession of any lands on the first day of November, one thousand eight hundred and fifty-one, or at any time previous, nor of any person holding under such resident, shall be defeated or prejudiced on account of his own alienism, or the alienism of any other person through whom his title may have been derived.[2]

A further provision declares that "the alienage of any woman shall not bar her right to one third of her husband's lands, if her husband was a citizen of the United States, or if, being an alien, he had complied with the laws of this State to entitle him to hold lands."[3]

16. *Iowa.*—The constitution of 1857 contains the following provision:—

Foreigners who are, or may hereafter become residents of this State, shall enjoy the same rights in respect to the possession, enjoyment, and descent of property, as native born citizens.[4]

By the act of March 15, 1858, aliens residing in the United States who have declared their intention to become citizens, and aliens resident in the State, are capable of acquiring real estate by descent or purchase, and of holding and alienating the same, as if they were citizens. Aliens may also take by devise or descent from any person capable at the time of his death of holding lands in the State. So, also, they may purchase lands from any person authorized to hold the same at the time of such purchase; but they must sell and convey such lands within ten years from the date of the purchase, or the taking effect of the enactment, to some person capable of acquiring and holding absolute title to real estate. The act contains a saving as to previous acquisitions. It is also provided that every

[1] Act of March 3, 1845, 1 Purple's Dig. p. 494, ch. 2, § 2; 1 Stat. of Ill. (1858,) p. 151; see Sisk *v.* Smith, 1 Gilm. 518.

[2] 1 Rev. Stat. 1852, p. 232, §§ 1, 3.

[3] 1 Rev. Stat. 1852, p. 255, § 43. For the former law, see Rev. St. 1843, p. 414; and p. 431, ch. 28, § 105. See, also, Doe *v.* Lazerly, 1 Carter, 234; Eldon *v.* Doe, 6 Blackf. 341; State *v.* Blackmo, 8 Blackf. 246.

[4] Const. 1857, Art. 1, § 22.

married woman whose husband dies, capable at the time of his death of acquiring and holding an absolute title to real estate, though she be an alien, shall be entitled to the same rights of dower as if she were a resident of the State. If a citizen dispose of his property by will to an alien non-resident, and subsequently to the making of the will the latter becomes a resident, the devise or bequest becomes operative.[1]

17. *Kentucky.*—In Hunt *v.* Warnicke,[2] it was held that under the ordinance of Virginia of 1776 the common law of England relating to aliens was in force in Kentucky. In Fry *v.* Smith, decided in 1834, it was held that lands in that State do not pass by descent to heirs who are aliens, but vest in the Commonwealth without office found.[3] The case of Alsberry *v.* Hawkins,[4] determined in 1839, presented a question of more than ordinary interest. The facts were as follows: Thomas Alsberry, and Leah his wife, once citizens of Kentucky, emigrated in 1824 to the province of Texas, where he died in 1826, and where she continued to reside until 1836, when she returned to Kentucky for temporary purposes, intending to go back to Texas as her home. A short time after her arrival in Kentucky she instituted proceedings for dower in lands which had been purchased from her deceased husband during the coverture, and prior to their removal to Texas. Her claim was resisted, chiefly on the ground that she had ceased to be a citizen of Kentucky, and of the United States, which she denied, though she had sued as a non-resident. It was decided that as to non-resident aliens the common law of England was in force in the State: That an American citizen had a right to emigrate, and renounce his allegiance to the government of the Union, and of the State: That whenever this right has been exercised, it is presumed to have been done with the concurrence of both governments, though without the express sanction of either: That the facts of the case, unexplained, were sufficient to authorize the presumption that Mr. and Mrs. Alsberry had ceased to be citizens of Kentucky, and become in fact and in law citizens of Texas, in accordance with the laws of that province: That it de-

[1] Act of March 15, 1858; Iowa Rev. Laws, (1860,) p. 421, §§ 2488-2493. See Stemple *v.* Herminghouser, 8 Iowa, 408.

[2] Hunt *v.* Warnicke, Hard. 61.

[3] Fry *v.* Smith, 2 Dana, 89. See, also, Dudley *v.* Grayson, 6 Mon. 260; Stevenson *v.* Dunlap, 7 Mon. 143.

[4] Alsberry *v.* Hawkins, 9 Dana, 177.

volved upon the demandant to repel this presumption by explanatory evidence, and in the absence of such evidence, she was adjudged an alien at the time of her husband's death, and consequently not entitled to dower.[1]

The doctrine of the right of voluntary expatriation without the *express* consent of the government, recognized in this case, is generally denied in the United States.[2]

18. By an act passed in 1800, any alien other than an alien enemy, who had actually resided in the State two years, was enabled to receive, hold, and pass any right or title to land during the continuance of his residence after that period.[3] But in order to avail himself of the benefits of this act, the alien was required to be an actual resident of the State at the time his right accrued.[4] A similar statute is still in force in Kentucky.[5] And it is further provided that any alien, being a free white person, who has purchased, or contracted to purchase any real estate, or who has any title thereto, and who shall become a citizen of the United States before the same is escheated by a proper procedure; and where any such person having title to lands shall sell, lease, or devise the same, or die seized or possessed thereof before any proceeding is instituted for the purpose of escheating the same, such person in the first case, and in the second, the purchaser, lessee, heir, or devisee from him, if a citizen of the United States, shall take and hold the same discharged from any claim of the State by reason of the alienage of such person. Any woman whose husband is a citizen of the United States, and any person whose father or mother at the time of his birth was a citizen of the United States, although born out of the United States, may take and hold real or personal estate, by devise, purchase, descent, or distribution. An alien, the subject or citizen of a friendly State, may take and hold any personal property, except chattels real; or if he reside within the State, may take and hold lands for the purposes of residence or occupation by him or his servants, or for the

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[1] A similar point was involved in Moore *v.* Tisdale, 5 B. Mon. 352, and it was there held that a wife is not concluded by the election of her husband to become a subject of another government, but that after his death she may return and resume her rights of citizenship.

[2] 2 Kent, 43; Brightly's Dig. 83, note. See, also, Brooks *v.* Clay, 3 A. K. Marsh. 549.

[3] White *v.* White, 2 Met. (Ky.) 185; Trustees *v.* Gray, 1 Litt. 149. See Dudley *v.* Grayson, 6 Mon. 260.

[4] White *v.* White, 2 Met. (Ky.) 185. [5] 1 Stant. Rev. 289, Art. 8, § 1.

purposes of any business, trade, or manufacture, for a term not exceeding twenty-one years; and he shall have the like rights, remedies, and exemptions touching such property, as if he were a citizen of the United States.[1]

19. *Kansas.*—By the constitution of Kansas

No distinction shall ever be made between citizens and aliens in reference to the purchase, enjoyment, or descent of property.[2]

20. *Louisiana.*—In this State the common law disability as to aliens is substantially removed. They may inherit real estate, and transmit it *ab intestato*.[3]

21. *Massachusetts.*—The early Massachusetts cases fully recognize the common law disability of alienage. In Sewall *v.* Lee[4] it was held that neither the widow of an alien nor the alien widow of a citizen could be endowed of her husband's lands.[5] But by degrees this disability has been completely removed. The act of 1812 gave dower to the alien widow of a citizen of the United States, saving, however, the rights of purchasers in lands conveyed before the passage of the act.[6] The revised statutes of 1836 provided that "the alienage of any woman shall not bar her right of dower excepting as to lands conveyed by her husband, or taken from him by execution before the twenty-third day of February, in the year one thousand eight hundred and thirteen."[7] The enactment now in force is as follows:—

Aliens may take, hold, transmit, and convey real estate; and no title to real estate shall be invalid on account of the alienage of any former owner, but nothing contained in this section shall defeat the title to any real estate heretofore released or conveyed by the commonwealth, or by authority thereof.[8]

22. *Maine.*—By the revised statutes of 1857

An alien may take, hold, convey, and devise, real estate or any interest

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[1] 1 Stant. Ky. Stat. p. 239, Art. 3, §§ 2–4.

[2] Const. Kan. 1859, Bill of Rights, § 17.

[3] Christy's Dig. tit. Alien; Phillips *v.* Rogers, 5 Martin's La. Rep. 700; Duke of Richmond *v.* Miln, 17 Louis. 812; 2 Kent, 54, note, and 70.

[4] Sewall *v.* Lee, 9 Mass. 363.

[5] See, also, Sheaffe *v.* O'Neil, 1 Mass. 256; Fox *v.* Southack, 12 Mass. 143; Scanlan *v.* Wright, 18 Pick. 523; Slater *v.* Nason, 15 Pick. 345; Foss *v.* Crisp, 20 Pick. 121; Piper *v.* Richardson, 9 Met. 155.

[6] 2 Mass. Laws, p. 324; Acts of 1812, ch. 93, §§ 1, 2.

[7] Rev. Stat. 1836, p. 411, ch. 60, § 14.

[8] Stat. 1852, ch. 29; Gen. Stat. Mass. (1860,) p. 478, § 38.

therein. All conveyances and devises of such estate or interest, already made by or to an alien, are confirmed and made valid.[1]

The act regulating dower contains the following provision:—

The widow of a citizen of the United States who was an alien when she married him shall be entitled to dower in her husband's estate which was not conveyed by him, or taken from him by execution prior to the twenty-third day of February, eighteen hundred and thirteen.[2]

23. *Maryland.*—The rule of the common law, formerly prevailing in Maryland,[3] is now considerably modified by statute. By the act of 1813, alien females intermarried with citizens of the United States, and residing therein, became entitled to dower.[4] It was held, however, that this act did not apply to alien women who had never resided in the United States during their coverture, but was limited to resident aliens only.[5] By the present statute, aliens, actual residents of the State, may take and hold lands acquired by purchase, or to which they would, if citizens, be entitled by descent, and may sell and dispose of the same; provided, that if any male alien acquires any interest in real estate, he shall, within one year thereafter, declare his intention of becoming a citizen according to the laws of the United States, and shall also, within twelve months after his being capable of becoming a citizen, naturalize himself agreeably to said laws. If any male alien shall die within one year after acquiring any real estate without making such declaration, or having made the declaration, if he die within the term prescribed for his becoming a citizen, and without having disposed of his real estate, then it shall descend to his heirs as if he had been a citizen at the time of his death; provided, that such heirs, being male aliens, shall comply with the foregoing provisions. If any alien makes sale of any real estate before becoming naturalized, and after the sale refuses or neglects to become naturalized, the sale shall nevertheless be valid. The heirs of any alien may hold the real estate of such alien in the

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[1] Rev. Stat. 1857, p. 449, ch. 73, § 2; Laws 1856, ch. 198.

[2] Rev. Stat. 1857, p. 605, ch. 103, § 7; Rev. St. 1840–1, p. 392, ch. 95, § 7. For former laws, see "Laws of Maine," (1821,) vol. i. p. 150, § 4; Rev. Stat. 1840–1, ch. 91, §§ 2, 3; Ibid. ch. 93, §§ 5–7. See, also, Mussey *v.* Pierre, 11 Shep. 559; Potter *v.* Titcomb, 22 Maine, 300.

[3] McCreery *v.* Allender, 4 Har. & McH. 409; McCreery *v.* Somerville, 9 Wheat. 354; Owings *v.* Norwood, 2 Har. & J. 96.

[4] Md. Stat. 1813, ch. 100; Laws of Maryl. vol. vi.; 3 Dorsey, p. 2621.

[5] Buchanon *v.* Deshon, 1 Harr. & Gill, 280.

same manner that natural-born citizens are entitled to hold real estate, provided they proceed to comply with the provisions of the law relating to naturalization. Any free white female born without the United States, who has married a citizen of the United States, and actually resides therein after marriage, is entitled to acquire, hold, and dispose of real estate as fully and amply as if she were a native citizen.[1]

24. *Missouri.*—Under the act of 1820, the widow of a resident alien who had declared his intention to become a citizen of the United States, was held entitled to dower.[2] The act of 1845 contains similar provisions:

> All aliens residing in the United States, who shall have made a declaration of their intention to become citizens of the United States by taking the oath required by law, and all alien residents in this State, shall be capable of acquiring real estate in this State by descent or purchase, and of holding and alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States.[3]

25. *Michigan.*—The constitution of 1850 provides as follows:—

> Aliens who are, or who may hereafter become *bona fide* residents of this State, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property, as native born citizens.[4]

By the statutes in force, any alien may acquire and hold lands by purchase, devise, or descent; and he may convey, mortgage, or devise the same; and if he die intestate the same descends to his heirs, in like manner as if he were a native citizen of the State, or of the United States. The title to any lands granted before the passage of the act shall not be questioned, nor in any manner affected by reason of the alienage of any person from or through whom the title is derived.[5] An alien woman is not on that account barred of her dower, and any woman residing out of the State is dowable of the lands of which her husband died seized, in like manner as if she and her husband had resided in the State at the time of his death.[6]

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[1] Maryl. Code, (1860,) p. 18, Art. iv. §§ 1–8. For the statute of 1814, see 1 Dorsey, 625, ch. 79.

[2] Act of Dec. 6, 1820; Stokes *v.* Fallon, 2 Misso. 32.

[3] Rev. Stat. 1845, p. 113, ch. 6, § 1.

[4] Const. 1850, Art. 18, § 13.

[5] 2 Comp. L. Mich. p. 857, ch. 90, §§ 35, 36; Rev. Stat. Mich. (1837–8,) p. 266, §§ 26, 27; Rev. Stat. 1827, p. 272.

[6] 2 Comp. L. Mich p. 853, ch. 89, § 21. See Rev. Stat. 1837–8, p. 265, § 15; Territorial act of March 31, 1827.

26. *Mississippi.*—Aliens residing in this State may acquire and hold real estate therein by purchase, gift, devise, or inheritance, and may, after they have been naturalized according to the laws of the United States, convey the same as other citizens. If an alien resident of the State dies seized or possessed of lands, the same shall, if he has been naturalized, descend to his heirs according to the laws of descent; but if he die without having been naturalized, then the lands shall be sold as an escheat, and the money arising therefrom paid into the treasury of the State, subject to the claim of the heirs of the decedent, provided they apply therefor within six years thereafter.[1]

27. *Minnesota.*—Any alien may acquire and hold lands by purchase, devise, or descent; and he may convey, mortgage, and devise the same, and if he die intestate, his lands shall descend to his heirs in like manner as if he were a native citizen of the State, or of the United States.[2] Alienage is no impediment to dower; and any widow, non-resident of the State is dowable of lands lying within the State in the same manner as if she and her husband had been residents at the time of his death.[3]

28. *New York.*—In this State the first reported case in which the question as to the effect of alienage upon the right of dower was presented, is that of Kelly *v.* Harrison.[4] It was originally tried in 1799 —was not affected by any local legislation, but was determined solely upon the application of the principles of the common law. The case was this: Kelly, a native of Ireland, removed to New York, in 1760, where he continued to reside until his death, in 1798. He left a wife in Ireland at the time he removed from that country, having been married in 1750. His wife was a native of Ireland, and never left the country, but remained there down to the period of his death. After the death of Kelly, proceedings were instituted by the widow, in the courts of New York, to recover dower in the lands of which he died seized in that State, and the claim was resisted upon the ground that she was an alien, and therefore not entitled to dower. It was held by the court, that as to the lands of which her husband was seized prior to the 4th of July, 1776, she was entitled to dower,

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[1] Rev. Code Missis. (1857,) pp. 806, 820, ch. 86, sec. 9, Art. 65, 66; Act of March 12, 1856.

[2] Rev. Stat. 1858, p. 411, § 85.

[3] Ibid. p. 409, § 21.

[4] Kelly *v.* Harrison, 2 John. Cas. 29.

but not as to lands acquired after that period. This decision was put upon the ground that the demandant by her intermarriage with the deceased, had, previous to the Revolution, acquired a right, in the event of his death, to be endowed of the estate of which he was then seized. And it was said that the right thus far acquired, though dependent on the contingency of her surviving him, ought not to be impaired by the circumstance that a revolution intervened before the contingency happened. The court further held, under the facts shown in the case, that at the Revolution the demandant became an alien, and her husband an American citizen, and as to lands acquired after that period, they applied the general principle incapacitating aliens from taking a dower estate. This distinction was based upon the ruling in Calvin's case,[1] where it was determined that the division of an empire works no forfeiture of a right previously acquired. The court remarked that had the case been silent as to the continued residence of the widow abroad, it might have been presumed that her condition followed that of her husband, but as it was expressly stated to the contrary, they could make no such presumption. They also considered the effect of the ninth article of the treaty of amity concluded with Great Britain in 1794, but were of opinion that it did not reach the case, inasmuch as it merely permitted the subjects and citizens of either nation, holding lands in the territories of the other, to sell, devise, and dispose of such lands at pleasure. This language was construed to refer solely to rights that were vested and complete, and not to a contingent right of dower.

29. An act was passed by the legislature of New York, on the 26th of March, 1802, by which it was provided that all purchases of lands made or to be made by any alien who had come into that State and become an inhabitant thereof, should be deemed valid to vest the estate to him granted; and it was made lawful for such alien to dispose of and hold the same to his heirs or assigns forever. But the right to make any purchase of land thereafter was limited to one thousand acres.[2] On the 8th of April, 1808, a second act was passed, by which the foregoing provisions were extended to all aliens who had come into the State and become inhabitants thereof at the close of the then session of the legislature. It was further enacted thereby that all persons authorized to purchase real estate, either by

[1] Calvin's case, 7 Co. 27, b.; Kirby's Rep. 143.
[2] 2 R. L. p. 541; 3 Rev. Stat. p. 843.

the original or the amendatory act, might also take and acquire by devise or descent.[1] In the case of Sutliff *v.* Forgey,[2] which afterwards exercised a controlling influence in the courts of New York, a question as to the proper construction of these statutes, with reference to the right of dower, was made and determined. The demandant for dower, Sarah Sutliff, with her husband, Richard Sutliff, both of whom were aliens, came to the State of New York on the 21st day of July, 1786, with the intention of becoming citizens thereof. They resided within the limits of the State until the death of the husband, which took place in November, 1830. During his lifetime, and on the 29th day of August, 1803, he was duly naturalized according to the requirements of the act of Congress then in force; and in January, 1804, had purchased and become seized of the premises, not exceeding one thousand acres, of which dower was demanded. Upon these facts two questions arose: 1. Whether the naturalization of the husband removed the disability of the wife. 2. Whether the acts of 1802 and 1808, by proper construction, embraced the acquisition of a contingent estate of dower. The first question was answered in the negative; the second was determined in the affirmative, and dower was awarded to the demandant. The difficulty arising upon the last point was owing to the fact that the two statutes taken together authorized lands to be acquired only by *purchase*, *devise*, or *descent*, which words, it was admitted, did not include the claim of dower. But it was held that the purchase by the husband inured to the benefit of the wife within the equity and spirit of the law. "The demandant," said Woodworth, J., "was authorized to purchase, but a purchase can not be effected by her except through the medium of her husband. The act must have intended this mode of acquiring, or, as to her, it becomes a dead letter. The intention of the legislature was to encourage aliens to settle in this State by removing the disability of alienism. The property purchased is secured to the alien purchaser, his heirs and assigns; he is allowed to take by devise or descent. The claim of dower was entitled to equal favor, and no doubt it was intended by the act to protect it. . . . . The right to dower is an interest in lands. When the conveyance was made to the husband, in 1804, this interest was contingent, it is true, but it was a right known and recognized by the law, and be-

[1] 2 R. L. p. 543; 3 Rev. Stat. 344.

[2] Sutliff *v.* Forgey, 1 Cowen's Rep. 89.

came absolute on the death of the husband. . . . . It cannot, I think, on any principle of sound construction, be said that the demandant is not a purchaser of this right of dower as clearly as that her husband became seized of the fee. The deed to the husband necessarily inured to the benefit of the wife so far as to secure to her such right in the premises as she would have taken had she not been an alien." The judgment was affirmed in the Court of Errors, on proceedings instituted by the defendant below.[1]

30. The legislature of New York made some further general statute regulations on this subject in 1825. In that year an act was passed by which it was provided that any alien who should make and file a deposition before any officer authorized to take the proof of deeds, that he was a resident in said State, and intended always to reside in the United States, and become a citizen thereof as soon as he could be naturalized, and that he had taken such incipient measures as the laws of the United States required to enable him to obtain naturalization, should thereupon be authorized and enabled to take and hold lands, and real estate of any kind whatsoever, to him, his heirs and assigns forever; and might, during six years thereafter, sell, assign, mortgage, devise and dispose of the same, in any manner as he might or could do if he were a native citizen of said State, or of the United States, except that he should have no power to lease or demise any real estate which he might take or hold by virtue of said provision until he became naturalized. It was further declared that such alien should not be capable of taking or holding any real estate which might have descended, or been devised or conveyed to him previously to his having become such resident, and made the deposition aforesaid.[2] An act was also passed by which it was declared that every devise of any interest in real property to a person who, at the time of the death of the testator, should be an alien, not authorized by statute to hold real estate, should be void.[3] On the 15th of April, 1830, still another act was passed, giving to any resident alien who had purchased and taken a conveyance for any lands within the State, before making the deposition required by the statute first above mentioned, the right to hold in the same manner as if such deposition had been

[1] Forgey v. Sutliff, 5 Cowen's Rep. 713.
[2] 1 Rev. St. 720, §§ 15, 16, 17.
[3] 2 Rev. St. 57, § 4.

made, provided such deposition should be made within one year thereafter.[1]

31. In the case of Mick *v.* Mick,[2] the force and effect of the foregoing provisions were discussed and settled, to some extent, by the Supreme Court of the State. The action was ejectment, brought by the plaintiff to recover an equal undivided ninth part of certain lands of which his father died seized. The defendant was the stepmother of the plaintiff. She was born in Ireland, emigrated to this country in the year 1829, and, about twelve years before the commencement of the action, was married to the father of the plaintiff, who was a native-born citizen of this country. In 1823 the husband received a conveyance of the lands in question; in March, 1830, he made his last will and testament, devising his farm to the defendant, and in May of the same year died. In the following month of June the defendant made a deposition in due form, before a proper tribunal, of her residence, and desire to be naturalized, and received a certificate of naturalization. Upon this evidence the defendant claimed that she was entitled to hold the land under the devise to her, and that at all events she could not be dispossessed of one-third thereof, being entitled to hold so much as her dower. The case was ruled against her upon both points. Not having been naturalized at the death of her husband, she was excluded from the benefit of the devise, by reason of the enactment referred to in the preceding section, making void every devise of any interest in real property to a person who, at the death of the testator, should be an alien, not authorized by statute to hold real estate, which changed the rule of the common law in so far as it permitted an alien to take by devise and hold until office found. It was also held that she could not take as devisee by virtue of section 15 of 1 Rev. Statutes, 720, for the reason that no deposition had been filed by her previous to her husband's death. Also that she was not aided by the act of 1830, although she had filed her deposition within a year after the death of her husband, because that act related to lands obtained by *deed*. "During the husband's lifetime," observed the court, "the estate was in him; when he died, it passed from him. At that moment she had clearly no capacity to take. She was not then authorized

[1] 3 Rev. St. 2d ed. pp. 227, 229.

[2] Mick *v.* Mick, 10 Wend. Rep. 379.

by any statute to hold real estate. The estate vested somewhere; it could not then vest in her, for by the 2 R. S. 57, § 4, the devise to her was void. The estate then vested in the heirs at law. This took place upon the death of her husband, on the 14th of May, 1830. The defendant did not file the deposition required until June afterwards, and that act could not divest an estate already vested by operation of law. Had she filed the deposition before the death of her husband, the devise would have been good. The act of 1830 can only relate to those cases where an alien may take and hold until office found, as by deed; and it would be so by devise, too, but for the clause above referred to, rendering a devise void unless the devisee had authority by statute to take and hold real estate." In regard to the claim for dower, it was decided that the defendant could derive no benefit from the acts of 1802 and 1808;[1] first, because she was not an inhabitant of the State in 1808, and, secondly, because her husband, being a natural-born citizen, did not make the purchase by virtue of these statutes. And while conceding the case of Sutliff *v.* Forgey[2] to have been correctly decided, a distinction was taken between the case of an alien widow of a resident alien who had purchased lands under the enabling acts, and of an alien widow of a native-born citizen, in favor of the former. "The legislature," remarked the court, "in all their liberality to resident aliens, have never made any provision for the alien widow of a natural-born citizen. She is, and always has been excluded, by the common law, from dower in the lands of her husband; no statute has ever been passed ameliorating the common law in her behalf."

82. In the case of Priest *v.* Cummings,[3] the Supreme Court adjudged that the *alien* widow of a native-born citizen was entitled to dower in lands held by her husband during the coverture, provided she were an inhabitant of the State at the passage of the act of 1802[4] enabling aliens to purchase and hold real estate; and the doctrine of the case of Mick *v.* Mick, so far as it maintained the contrary, was denied to be law. The reasoning of Nelson, J., upon this point, is as follows: "It was insisted, upon the argument," he said, "by the counsel for the plaintiff below, that the principle adjudged in the case of Sutliff *v.* Forgey, 1 Cowen, 89, affirmed in error, 5 Id. 713, was conclusive in her favor; and, after the most attentive consideration, I

[1] See ante, § 29.
[2] Sutliff *v.* Forgey, 1 Cowen's R. 89; ante, § 29.
[3] Priest *v.* Cummings, 16 Wend. 617.
[4] Ante, § 29.

can not but think it is so. There, the husband had been naturalized on the 29th of August, 1803, and made the purchase on the 4th of January, 1804, the wife, the demandant, at the time being an alien, and continuing so until the commencement of the suit. The naturalization of the husband placed him upon the footing, in respect to the acquiring and holding real estate, of a natural-born citizen. 1 Black. Com. 374; Bac. Abr. tit. Aliens, 129; 1 Inst. 89; 1 Cowen, 95. The position was there taken by the counsel for the demandant, that the naturalization of the husband operated to naturalize the wife; but this was denied by the court. And as judgment was given for her, notwithstanding, it would seem to follow, as a principle necessarily deducible from the case, that an alien widow of a natural-born citizen would be entitled to her dower under like circumstances, because, if entitled to dower in an estate purchased by the husband after naturalization, *as he stands precisely upon the footing of a natural-born citizen*, the dower of the alien widow of the latter can not consistently be denied. After naturalization, the enabling statutes were no way material or connected with the purchase, which was made by virtue of the authority derived from citizenship, as in the case of a natural-born citizen." The right of the widow to dower was placed exclusively upon the enabling acts of 1802 and 1808.[1] The demandant was proved to have been an inhabitant of the State before the passage of either of those acts; to have been naturalized in October, 1829, and to have continued her residence in the State until the death of her husband in 1832. The lands in which dower was demanded had been conveyed to the husband in 1796, before the marriage, which took place in January, 1802. The premises had been conveyed by mortgage executed in June, 1802, under which proceedings in foreclosure were had, and the premises sold in June, 1804. The wife joined in the execution of the mortgage, but being a minor at the time, she was held not to be bound thereby. The court were of opinion that, on the above state of facts, the demandant, by virtue of the enabling acts above mentioned, possessed, during the coverture, capacity to take and hold lands; that the husband, being a natural-born citizen, was invested with the same capacity, independently of those enactments, and, in that particular, occupied the same position as a naturalized citizen or an alien resident who was within the acts; that by reason of the concurring capacity on

[1] See ante, § 29.

the part of both husband and wife to take and hold lands during the coverture, the seizin of the husband inured, under the act of 1802, to the benefit of the wife. For these reasons the Supreme Court, conceiving the case to be within the doctrine of Sutliff *v.* Forgey, granted the petition for dower. The naturalization of the wife in 1829 was held not to affect the question, upon the ground that it could not have a retroactive effect.[1]

33. The case, however, went to the Court of Errors, and there the judgment of the court below was reversed.[2] The Court of Errors held that the act of 1802 had no application to cases where, as in the one before them, the lands in which dower was claimed were acquired by the husband, and the marriage took place *previous* to the passage of the act; and it was in this manner that they distinguished the case from that of Sutliff *v.* Forgey. "I have no desire to disturb the authority of that decision," observes Senator Verplanck, in the course of his opinion, "which was settled in congruity with all the views I have taken of this case. That was the case of a resident alien widow whose husband (whether alien or naturalized seems wholly immaterial) actually *bought* lands *during marriage*, and *after* the enactment of the enabling statutes. It was there held that this purchase of lands inured to the benefit of the wife, *who was at the time enabled to take a valid title in real estate;* that her dower 'being an incident or legal consequence' of the acquisition of land by the husband, she was a buyer within the intent of the law, the husband's purchase being in fact *hers* to the extent of the right of dower. This certainly differs from the case before us in the most material points, and though the decision rests on a very liberal construction of the statutes, yet I doubt not that it is within their spirit and intent, and should unquestionably govern all similar cases." Senator Wagner, who delivered a dissenting opinion, contended that the case was clearly within the spirit of the ruling in Sutliff *v.* Forgey, and that the judgment should be affirmed.

34. In Connolly *v.* Smith,[3] the Supreme Court went to the extent not only of sustaining the case of Mick *v.* Mick,[4] as to the incapacity of an alien widow of a native-born citizen to be endowed, but held also that the alien widow of a *naturalized* citizen labored under the same disability, notwithstanding the various enabling acts in force at

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[1] See post, §§ 54–58.

[2] Priest *v.* Cummings, 20 Wend. 338.

[3] Connolly *v.* Smith, 21 Wend. 59.

[4] Mick *v.* Mick, 10 Wend. 379; ante, § 31.

the time. The husband, an alien, came to reside in the State in 1822. In August, 1823, he took the incipient steps to become naturalized, by duly declaring his intention to become a citizen. In January, 1828, he made and filed the deposition and certificate required by the act of 1825.[1] In February, 1828, the premises in which dower was claimed were conveyed to him. In the month of April following he was married to the plaintiff, who was an alien, and first came to reside in the State in 1822. She had not then, nor at any time since the marriage, taken any steps under any of the enabling statutes to enable her to purchase or hold real estate. In March, 1829, her husband completed his naturalization, and in 1834, died. The claim of the plaintiff for dower was denied. 1. Because both her husband and herself came to the State subsequent to the legislative session of 1808, and therefore were not within either the act of 1802 or that of 1808.[2] 2. Because she had not taken the incipient steps to be naturalized, nor made and filed the deposition required by the act of 1825, and therefore could take nothing by reason of the provisions of that act. 3. Because the second section of the dower act[3] (and which was here adverted to for the first time in the reported cases) did not apply to her, she not being the widow of an *alien*, but of a naturalized citizen; thus making the right of the widow to dower depend upon the final act of the husband in completing his naturalization; for, from the date of the marriage in April, 1828, down to the month of March, 1829, when he completed his naturalization, he was an alien; but during all that period he was entitled by law to hold lands in the State, having taken the preliminary steps and made the deposition required by statute. The real estate in which dower was claimed having been conveyed to him subsequently to his having taken those steps, he was fully authorized to hold the same. Had he died prior to taking the final step to perfect his naturalization, the plaintiff would clearly have been entitled to dower, for she would then have been "the widow of an alien, who, at the time of his death, was entitled by law to hold real estate; and an inhabitant of the State at the time of such death." Thus, in this case, the contingent right of dower had attached at the marriage of

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[1] 1 Rev. St. 720, §§ 15, 16; ante, § 80. [2] See ante, § 29.

[3] 1 Rev. Stat. (1st ed.) 740. This section reads as follows: "The widow of any alien, who, at the time of his death, shall be entitled by law to hold any real estate, if she be an inhabitant of this State at the time of such death, shall be entitled to dower of such estate in the same manner as if such alien had been a native citizen."

the parties; had continued until March, 1829, when, in the judgment of the court, it was divested by the simple act of the husband in taking out his final naturalization papers.

35. In Currin *v.* Finn[1] the doctrine was reaffirmed that the statute allowing dower to the resident widow of an alien husband,[2] had no application where the husband was a citizen and the widow an alien. The plaintiff, an alien, had moved into the State prior to 1802; was married in 1818 to a citizen of the State, who died, leaving her his widow, in April, 1838. But the lands of which she claimed to be endowed were conveyed to her husband in 1833, and while, therefore, the act of 1825[3] was in force. As she had taken none of the steps required by that statute to enable her to hold real estate, she was of course excluded from the benefit of its provisions. As to the claim for dower, so far as it was founded on the second section of the dower act, the judge delivering the opinion of the court used this language: "The remark of the late Mr. Justice Cowen in Connolly *v.* Smith, (21 Wend. 62,) I think is well sustained by the adjudications on this question, that 'the course of legislation has been such, that while it has conferred a right of dower on the resident alien widow of an alien purchaser, it has denied the same right to an alien widow of either a natural born or naturalized citizen, unless she file the proper deposition.'" This opinion was pronounced as late as July, 1846.

36. Were it not for this imposing array of judicial authority to the contrary, it might seem to admit of a well-founded doubt whether the discrimination thus made against alien widows of native-born and naturalized citizens, did not only come in conflict with the spirit and policy of the enabling acts, but tend also to defeat the very objects and purposes which led to their adoption. And however the fact may be with regard to the propriety of this suggestion, it is quite certain that the views of the courts were not entirely satisfactory to the people of the State, for in April, 1845, a law was passed greatly enlarging the privileges conferred upon aliens, and correcting the then existing law in the particular above mentioned, by providing, in express terms, that the wife of an alien resident dying seized, and an alien woman marrying a citizen, should be entitled to dower.[4] By the same enactment it is provided that the

[1] Currin *v.* Finn, 3 Denio, 229. [2] 1 Rev. St. 740, 1st ed. § 2. [3] See ante, § 30.

[4] Act of April 30, Laws 1845, ch. 115, p. 94. §§ 2, 3; N. Y. Rev. St. 5th ed. vol. iii. p. 7, §§ 84, 85.

deposition required by the act of 1825 will avail, though filed subsequent to the acquisition of title, to enable an alien to hold lands in the same manner and with the same effect as a citizen of the United States. The grantees or devisees of resident aliens are made capable of taking and holding in the same manner as if such aliens were citizens, but if any of such devisees or grantees are aliens, and males of full age, they must file a deposition, as before, subject to a like condition as to filing it. The heirs at law of an alien resident may take and hold the real estate of their ancestor. On the same condition before referred to, an alien resident may grant or devise lands to a citizen or alien.[1] In New York, therefore, the law with respect to aliens stands upon a much more liberal footing than formerly.[2]

37. *New Jersey.*—In this State any alien friend may purchase, hold, and dispose of lands as fully as a citizen may do. All purchases made previously to the passage of the act conferring this right are confirmed. Title to lands acquired by descent or devise since January 22, 1817, in case the heir or devisee be an alien friend, is declared valid, whether the ancestor or testator were an alien or not.[3] In making title by descent it is no bar that any ancestor through whom the title is derived was an alien.[4]

In Yeo *v.* Mercereau,[5] it was decided that the widow of an alien who purchased land in New Jersey while he was an alien enemy, before the 22d of January, 1817, and who continued to hold after

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[1] Act of April 30, 1845, ch. 115, §§ 1, 4, 5, 6; 3 N. Y. Rev. Stat. 5th ed. pp. 6, 7, §§ 33, 36, 37, 38. See, also, p. 6, § 30, Act of 1843, ch. 87, § 1; 2 Kent, 9th ed. p. 70, note; 4 Ibid. pp. 36, 37.

[2] Upon the question of alienage generally, and the construction of the several New York statutes relating to that subject, see the following cases: Jackson *v.* Lunn, 3 John. Cas. 109; Goodell *v.* Jackson, 20 John. 693; Jackson *v.* Etz, 5 Cowen, 314; Mooers *v.* White, 6 John. Ch. 360; Anstice *v.* Brown, 6 Paige, 448; Jackson *v.* Adams, 7 Wend. 367; Aldrich *v.* Manton, 13 Wend. 458; People *v.* Irvin, 21 Wend. 128; Banks *v.* Walker, 3 Barb. Ch. 438; Matter of Windle, 2 Edw. Ch. 585; Matter of Leefe, 4 Edw. Ch. 395; Farmers' Loan and Trust Co. *v.* The People, 1 Sandf. Ch. 189; Wright *v.* Trustees, &c. 1 Hoff. Ch. 202; Lynch *v.* Clarke, 1 Sandf. Ch. 583; Redpath *v.* Rich, 3 Sandf. S. C. 79; Beck *v.* McGillis, 9 Barb. 35; Cumberland *v.* Graves, Ibid. 595; S. C. 3 Seld. 305; Parish *v.* Ward, 28 Barb. 328; Watson *v.* Donnelly, Ibid. 653; McGregor *v.* Comstock, 3 Comst. 408; McCarthy *v.* Marsh, 1 Seld. 263; Wadsworth *v.* Wadsworth, 2 Kern. 376; McLean *v.* Swanton, 3 Kern. 535; Wright *v.* Saddler, 6 Smith, 320.

[3] Act of April 10, 1846, Nixon's Dig. p. 6, §§ 1, 2, 3.

[4] Act of April, 1846, Nixon's Dig. p. 197, § 12.

[5] Yeo *v.* Mercereau, 3 Harr. 387.

that period, and after he became an alien friend, was entitled to dower in such premises by virtue of the statute of that date.[1]

38. *New Hampshire.*—Any alien resident in this State may take, purchase, hold, convey, or devise any real estate, and the same may descend in the same manner as if he were a native citizen.[2]

39. *North Carolina.*—By the constitution of North Carolina,

> Every foreigner who comes to settle in this State, having first taken an oath of allegiance to the same, may purchase, or by other just means, acquire, hold, and transfer land, or other real estate.[3]

Although by this provision a resident foreigner who has taken the oath of allegiance may acquire land by *purchase*, and hold and transfer the same,[4] it is nevertheless held that he can not take by *devise* nor *descent*.[5] The Revised Code of 1854 contains the following provision:—

> Where any person shall die leaving relations, citizens of the United States, capable of inheriting his estate, if there might be no other nearer kindred, but who by a rule of the common law can not inherit, because there are others of nearer kindred, (as aliens, or others,) who can not hold land in the State, the estate of such deceased person shall descend to such of the first mentioned relations as would be entitled if there were no other relations whatever.[6]

40. *Ohio.*—As early as the year 1804 the legislature of Ohio passed the following enactment, which is still in force:—

> It shall be lawful for any and all aliens that now may have, or that hereafter shall be entitled to have, within this State, any lands, tenements or hereditaments, either by purchase, gift, devise, or descent, to hold, possess, and enjoy the same as fully and completely as any citizen of the United States or this State can do, subject to the same laws and regulations, and not otherwise.[7]

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[1] Elmer's Dig. p. 6; see, also, Ibid. pp. 131, 143; Rev. Stat. 1847, ch. 1, § 1; Laws of N. J. by Paterson, 26. The act of 1799 gave dower to alien widows; Paterson, p. 343, § 1. See, also, Colgan *v.* McKeon, 4 Zab. 566.

[2] Rev. St. ch. 129, § 4; Comp. Stat. 1853, p. 287, ch. 135, § 4. See Montgomery *v.* Dorion, 7 N. H. 475.

[3] Const. N. C. § 40.

[4] Rouche *v.* Williamson, 3 Ired. 141.

[5] Doe *v.* Hornibleu, 2 Hayw. 37, 104, 108; University *v.* Miller, 3 Dev. 192, 196; Copeland *v.* Sauls, 1 Jones, L. R. 70; Paul *v.* Ward, 4 Dev. 247; Atkins *v.* Kron, 2 Ired. Eq. 58, 423; S. C. 5 Ired. Eq. 207; Kay *v.* Webb, 1 Mur. 134; Marshall *v.* Loveless, Cam. & Nor. 217.

[6] Rev. Code N. C. (1854,) p. 249, ch. 38, Rule 9.

[7] 29 Ohio Laws, 463; Rev. St. 1841, p. 62, ch. 8; 1 Swan & Critchf. p. 69, ch. 8. A writer in the Western Law Journal has attempted to show that this act does not confer upon an alien any new right to acquire or hold real estate; 6 West. Law

41. *Oregon.*—By the laws of Oregon

Any alien may acquire and hold lands, or any right thereto, or any interest therein, by purchase, devise, or descent, and he may convey, mortgage and devise the same, and if he shall die intestate the same shall descend to his heirs; and in all cases such lands shall be held, conveyed, mortgaged, or devised, or shall descend in like manner, and with like effect as if such alien were a native citizen of this territory, or of the United States.[1]

42. *Pennsylvania.*—In the year 1683, William Penn, as proprietary of Pennsylvania, in a charter granted to the inhabitants thereof, declared that in the case of aliens purchasing lands in the province, and dying therein without being naturalized, their estates should descend as if they were naturalized.[2] In 1807 it was enacted that alien friends who had declared their intention to become citizens, might purchase and hold lands not exceeding five hundred acres.[3] An act was passed by the legislature of the State on the 22d of March, 1814, by which it is provided that all aliens who, on the 18th of June, 1812, resided in the State, and continued to reside therein, may, upon filing a declaration of their intention to become citizens, take, hold, and convey lands, not exceeding two hundred acres, nor in value twenty thousand dollars, as fully as citizens may do. By the act of March 24, 1818, alien friends are permitted to purchase lands not exceeding five thousand acres, and "hold the same to them, their heirs and assigns forever, as fully as any natural born citizen or citizens may or can do."[4] This act contains no condition with regard to residence. By an earlier statute the right of alien friends to take and hold lands by *descent* is given without restriction as to quantity.[5] An act was also passed in March, 1837, by which purchases by alien friends resident within the United States, not exceeding five thousand acres in quantity, and the titles of heirs and devisees of aliens, are confirmed.[6] The act of April 16, 1844, confirms titles previously acquired by aliens, either by purchase or de-

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Jour. 76. But this construction is contrary to the general understanding of the profession in Ohio, and appears to be in conflict with the intent of the legislature as fairly deducible from the act itself.

[1] Stat. of Oregon, (1855,) p. 409, § 85.

[2] Proud's Pennsylvania, vol. ii. App. 27.

[3] Act of Feb. 10, 1807, § 1; Purdon's Dig. by Brightly, p. 44, § 4.

[4] Purdon's Dig. by Brightly, p. 45, §§ 6, 7, 8.

[5] Stat. Feb. 23, 1791; Purdon's Dig. by Brightly, p. 44, § 1.

[6] Dunlop's Laws, 908; Purdon's Dig. by Brightly, p. 45, § 9.

scent, to lands not exceeding two thousand acres in quantity.[1] And the act of May 1, 1861, confers upon aliens the right to purchase and hold lands not exceeding five thousand acres, nor in net annual income twenty thousand dollars.[2]

43. It will be seen by the foregoing that the act of March, 1814, was confined to such aliens as resided in the State on the 18th of June, 1812. The act of March, 1818, appears to confer upon alien friends, whether resident of the State or not, equal power with native citizens to purchase, hold, and dispose of real estate, and transmit the same by descent. The only apparent restriction is with reference to the quantity, and as the disability within the limitation as to quantity is entirely removed, it would seem to follow that to the same extent the right of dower would attach. And a learned writer has said that in those of the United States in which an alien is permitted to hold land, alienage, whether of the husband or wife, would be no impediment to dower.[3] But in Pennsylvania, the ruling in Reese *v.* Waters[4] appears to leave this question somewhat in doubt so far as alien widows are concerned. It was there held, contrary to the view taken in Sutliff *v.* Forgey,[5] upon a statute somewhat similar, that the term "purchase," as used in the act of 1818, contemplated a purchase in the ordinary sense of that word, and that it could not be extended to what the court denominated a mere "technical purchase, which is such, only, for the purposes of classification under heads treated by commentators." And under this strict adherence to the literal terms of the act, it was decided that under the statute of 1818 an alien "acquires no title in his wife's estate of inheritance as tenant by the curtesy initiate."

44. *Rhode Island.*—In Rhode Island, courts of probate

Have power to grant petitions of aliens for leave to purchase, hold, and dispose of real estate within their respective towns, provided the alien petitioning shall, at the time of his petition, be resident within this State, and shall have made declaration, according to law, of his intention to become a naturalized citizen of the United States.[6]

45. *South Carolina.*—By the act of 1799 all free white persons

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[1] Purdon's Dig. by Brightly, p. 45, § 10.

[2] Ibid. § 11; sections 12 to 16, inclusive, confirm titles derived through aliens.

[3] 1 Greenl. Cruise, 174, note.

[4] Reese *v.* Waters, 4 Watts & Serg. 145; accord. Mussey *v.* Pierre, 24 Maine, 559.

[5] Sutliff *v.* Forgey, 1 Cow. 89; ante, § 29.

[6] Rev. Stat. 1857, p. 351, ch. 151, § 21.

resident in the State, (alien enemies, fugitives from justice, and persons banished from either of the United States excepted,) on taking an oath of allegiance, were enabled to purchase and hold real property within the State.[1] By the act of 1807, aliens who had declared their intention to become citizens of the United States, were permitted to take, hold, and convey lands, and titles derived from aliens were confirmed. Persons holding property under this act were permitted to convey or devise the same to their children or grandchildren; and if not conveyed or devised, it was to descend according to the law regulating descents; provided, however, that the children, grandchildren, or persons entitled to take by descent, should become residents in the State within twelve months after the date of the conveyance, or the decease of the testator or intestate, and also become citizens within as short a period as was allowed under existing laws.[2] A later act provides that when any person shall die intestate, leaving no lineal descendants, but leaving a widow, and a father or mother, and brothers or sisters of the whole blood, the estate real and personal of such intestate shall go, one moiety to the widow, and the other moiety, in equal proportions, to the brothers and sisters of the whole blood, and the father; or, if he be dead, the mother to take his share.[3] The rule of the common law is still further modified by the act of 1856, which is as follows:—

If any citizen of the United States shall die seized, possessed of, or interested in any land or real property situated and being within this State, and leave a widow born without the limits of the United States, and who has not been naturalized, such widow shall be entitled to all the same rights, interest and estate in and to such land and real property, and be possessed of the same powers, privileges, and capacities to hold, enjoy, convey, and transmit the same as if she were naturalized.[4]

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[1] 1 Brev. 236. See McClenaghan v. McClenaghan, 1 Strob. Eq. 295, and Labatut v. Scmidt, 1 Speer's S. C. Eq. 421, giving a construction to this act.

[2] Stat. S. C. vol. v. p. 546, §§ 1, 2; see Fox v. Husman, 7 Rich. 165, and Keenan v. Keenan, Ibid. 345, giving a construction to the acts of 1807, 1826, and 1828, 6 Stat. S. C. 284, 362; see, also, Vaux v. Nesbit, 1 McCord's S. C. Ch. 352, 374, holding that an alien was formerly incompetent to transmit lands by descent; S. P., Ennas v. Franklin, 2 Brev. 398.

[3] Acts of 1851, p. 80.

[4] Acts of 1856, p. 585. For further decisions under prior laws, see Haleyhuton v. Kershaw, 3 Desaus. 106; Sebben v. Trezevant, 3 Desaus. 213; Clifton v. Haig, 4 Desaus. 330; Scott v. Cohen, 2 Nott & McCord, 293; McDaniel v. Richards, 1 McCord, 187; Escheator v. Smith, 4 McCord, 452; Meeks v. Richbourg, 1 Rep. Con. Court, 411; Laurens v. Jenney, 1 Speer, 356; McCaw v. Galbraith, 7 Rich. 74; Davis v. Hall, 1 N. & M. 292; Richards v. McDaniel, 2 Rep. Con. Court, 18.

46. *Tennessee.*—The act of 1809 provided that in all cases where any person within the State should die intestate without issue, and possessed of any estate, real or personal, the said estate should descend to such person or persons who were next of kin to the decedent, and resident within the United States, to the perpetual exclusion of aliens who might be related to the decedent in a nearer degree.[1] This act was repealed by the statute of 1848.[2] The law now in force on the subject of alienage is as follows:—

1998. Any alien may take and hold real estate in this State by purchase, inheritance, or in any other way which may be agreed upon by treaty between the United States and the country of which he is a citizen or subject.

1999. Any alien resident in this State who has legally declared his intention under the naturalization laws to become a citizen of the United States, may take and hold, dispose of, or transmit by descent, any real estate as a native citizen.

2000. An alien who is resident in the United States at the time of the death of an intestate, and has declared, or shall within twelve months thereafter declare his intention, according to the acts of Congress, to become a citizen, shall become capable of inheriting the estate of such intestate.[3]

47. *Texas.*—Aliens may take and hold any property, real or personal, in this State, by devise or descent, from any alien or citizen, in the same manner that citizens of the United States may take and hold real or personal estate by devise or descent within the country of such alien. Any alien, being a free white person, who shall become a resident of the State, and shall, in conformity with the naturalization laws of Congress, have declared his intention to become a citizen, has a right to acquire and hold real estate in the same manner as if he were a citizen of the United States.[4]

48. *Virginia.*—Any alien friend, being a free white person, resident within the State, on making oath before competent authority that he intends to continue to reside therein, may inherit, or purchase and hold real estate as if he were a citizen of the State. And he may convey or devise any real estate so held by him, and if he

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[1] Act of 1809, ch. 53, § 1. This act came under review in Starks *v.* Traynor, 11 Humph. 292; see, also, Williams *v.* Wilson, Mart. & Yerg. 248.

[2] Act of 1848, ch. 165, § 1.

[3] Code of Tenn. by Meigs & Cooper, (1858,) p. 407, part 2, tit. 1, ch. 2; see, also, Car. & Nich. Dig. (1836,) p. 87, ch. 36.

[4] Act of Feb. 13th, 1854, ch. 70, §§ 2, 3; Oldham & White's Dig. Laws Tex. p. 83, art. 4, 5; see Merle *v.* Andrews, 4 Texas, 200; Hardy *v.* De Leon, 5 Texas, 211; Cryer *v.* Andrews, 11 Texas, 170; Lee *v.* Salinas, 15 Texas, 495; White *v.* Sabariego, 23 Texas, 243; Wardrup *v.* Jones, Ibid. 489; Jones *v.* McMasters, 20 How. U. S. 8.

die intestate it shall descend to his heirs, and any such alienee, devisee or heir, whether a citizen or an alien, may take under such alienation, devise, or descent, provided he shall, if an alien, come or be in the State within five years thereafter, and before some court of record declare on oath that he intends to reside therein. Any alien having an interest in real estate, who becomes a citizen of the United States, or who sells or devises the same before an escheat is declared, or dies seized or possessed thereof before proceedings for an escheat are instituted, such person himself in the first case, and in the second the purchaser, lessee, heir, or devisee from him, if a citizen of the United States, may hold the same, discharged from all claim of the State by reason of such alienage. Any woman whose husband is a citizen of the United States, and any person whose father or mother, at the time of his birth, was a citizen thereof, may take and hold real or personal estate, by devise, purchase, or inheritance, notwithstanding he or she may have been born out of the United States. Any alien resident, the subject of a friendly State, may take and hold lands for the purpose of residence, or for the purpose of any business, trade, or manufacture, for a term not exceeding twenty-one years. And when by any treaty in force between the United States and any foreign country, a citizen or subject of such country is allowed to sell real property within the State, such citizen or subject may sell and convey the same, and receive the proceeds thereof, within the time prescribed by such treaty.[1]

49. *Vermont.*—The constitution of Vermont contains the following provision:—

> Every person of good moral character who comes to settle in this State, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold, and transfer land, or other real estate; and after one year's residence shall be deemed a free denizen thereof, and entitled to all rights of a natural born subject of this State.[2]

50. *Wisconsin.*—The constitution of Wisconsin declares that

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[1] Code, 1849, p. 498, ch. 115, §§ 1–6. See Robertson *v.* Miller, 1 Brock. 466: Hubbard *v.* Goodwin, 3 Leigh, 492; Stephens *v.* Swann, 9 Leigh, 404; Jackson *v.* Sanders, 2 Leigh, 109; Barzizas *v.* Hopkins, 2 Rand. 276; Marshall *v.* Conrad, 5 Call, 364.

[2] Const. Verm. § 39. An exception is annexed as to eligibility to certain State offices until after two years' residence. See, also, State *v.* Boston, C. & M. R. R. Co., 25 Verm. 433; Albany *v.* Derby, 30 Verm. 718.

No distinction shall ever be made by law between resident aliens and citizens, in reference to the possession, enjoyment, or descent of property.[1]

It is provided by statute that aliens may take and hold lands by purchase, devise, or descent; and may convey, mortgage, or devise the same; and, if they die intestate, such lands shall descend in like manner as if they were citizens of the United States.[2] Alienage is no bar to dower; and any woman residing out of the State is entitled to dower in lands lying within the State of which her husband died seized, in the same manner as if she and her husband had been residents at the time of his decease.[3]

51. *District of Columbia.*—In the District of Columbia an alien may take, hold, transmit and convey lands, in the same manner as if he were a citizen of the United States.[4]

52. From the foregoing synopsis of the legislation and reported decisions of the different States on the subject of alienage, it will be seen that there is a marked difference in the several States with respect to the privileges conferred upon aliens, and the favor with which they are regarded. In a portion of the States the rule of the common law prevails with but little modification. In others its severity is more or less mitigated; while in others again it is entirely abrogated. The privileges thus conferred by State authority are strictly local, and necessarily territorial in their nature. Consequently, if the steps required by the naturalization laws of Congress have not been complied with, so as to give to the alien party the rights and privileges of a citizen, he is remitted, so far as the capacity or privilege to acquire, enjoy, or dispose of real estate is concerned, to the local laws and regulations of the particular State where the lands may be situate.[5] It is hardly necessary to add that the right to the estate of dower is governed by the same general rule.

Naturalization in the United States.

53. The Constitution of the United States confers upon Congress power "to establish a uniform rule of naturalization,"[6] and it seems

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[1] Const. Wis. art. i. § 15.
[2] Rev. Stat. 1849, p. 337, § 35; Rev. Stat. 1858, p. 549, § 35.
[3] Rev. Stat. 1849, p. 335, § 21; Rev. Stat. 1858, p. 548, § 21.
[4] Rev. Code Dist. Col. (1857,) p. 180, § 2.
[5] Corfield v. Coryell, 4 Wash. C. C. Rep. 371; 2 Kent, 70, 71.
[6] Art. 1, § 8, sub. 5.

that this power is possessed exclusively by that body.[1] Under the authority thus conferred a number of acts have been passed, prescribing the conditions, pointing out the manner, and declaring the effect of naturalization.[2] Any alien, being a free white person, who has resided in the United States for the prescribed period, and complied with all the conditions of the law to perfect his naturalization, is thereby "admitted to become a citizen of the United States, or any of them."[3] Children under the age of twenty-one years, of persons naturalized, if dwelling in the United States at the time of the naturalization of their parents, are considered as citizens.[4] In case any alien has taken the preliminary oath required by the act of 1802, and pursued the directions of the second section of the same act,[5] and dies before he is actually naturalized, the widow and children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such upon taking the oaths prescribed by law.[6] A married woman may avail herself of the benefits of this legislation, and become a naturalized citizen.[7] And it has been held that the consent and concurrence of her husband are not necessary to the validity of the act.[8] Naturalization of the husband does not, of itself, confer the rights of citizenship upon an alien wife.[9] But by a recent act of Congress the rights and privileges of alien feme coverts have been extended, and it is provided that any woman who might lawfully be naturalized under existing laws, and who is or shall be married to a citizen of the United

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[1] See Chirac v. Chirac, 2 Wheat. 259; United States v. Villato, 2 Dall. 372; Thurlow v. Massachusetts, 5 How. 585; Smith v. Turner, 7 Ibid. 556; Golden v. Prince, 3 Wash. C. C. Rep. 314.

[2] Act of 14th April, 1802, 2 Stat. 153; Act of March 26, 1804, 2 Stat. 292; Act of March 3, 1813, 2 Stat. 811; Act of March 22, 1816, 3 Stat. 259; Act of May 26, 1824, 4 Stat. 69; Act of May 24, 1828, 4 Stat. 310; Brightly's Dig. 33–36; 2 Kent, 51–54.

[3] Act of April 14, 1802, § 1.

[4] Ibid. § 4.

[5] This section was repealed by the act of May 24, 1828, § 1; 4 Stat. 310; see Brightly's Dig. 34, note. It prescribed regulations for the registry of aliens.

[6] Act of March 26, 1804, § 2. See Foss v. Crisp, 20 Pick. 121, and White v. White, 2 Met. (Ky.) 185, as to the effect of the death of the husband or ancestor before taking the final oath, and the requirement of the law in such cases.

[7] Ex parte Marianne Pic, 1 Cr. C. C. 372. See Brown v. Shilling, 9 Maryl. 74; McDaniel v. Richards, 1 McCord, 187.

[8] Priest v. Cummings, 16 Wend. 617; S. C. 20 Wend. 338.

[9] White v. White, 2 Met. (Ky.) 185; see Wightman v. Laborde, 1 Spear, (S. C.) 525.

States, shall be deemed and taken to be a citizen.[1] This law is substantially a re-enactment of the 7 and 8 Victoria, chap. 66, and is very important in its bearing upon the rights of alien women, for its effect appears to be to invest the alien wife of a citizen, whether native born or naturalized, with all the rights of a native-born woman, and indeed to make her marriage with a citizen, *ipso facto*, work her naturalization. It remains a question, however, whether the act extends to a case where the husband and wife are both aliens, and are married, either abroad or in this country, *before* the naturalization of the husband. A strict construction of the act would seem to require that the husband, at the time of the *marriage*, should be a citizen, but whether native born or by naturalization would not perhaps be material.

Naturalization in the United States prospective only.

54. Reference was made in the preceding pages to that feature of the English law which gives to the act of naturalization a retroactive effect, and it was incidentally stated that in the United States this doctrine was not recognized.[2] It remains for us to notice, in this connection, some of the decisions of the American courts with regard to this question.

55. The subject underwent very full and thorough discussion in the case of Priest *v.* Cummings;[3] and the opinion of the court upon the question is replete with learning, and exhibits with clearness and precision the law bearing upon it. "Assuming," says the judge delivering the opinion, "the naturalization in October, 1829, to have been valid, it is contended that it can not operate retrospectively, so as to attach the right of dower to premises which were previously aliened by the husband in 1802. The act of Congress affords no great light to aid us in determining this point of the case; it merely declares that upon complying with its provisions the applicant shall 'become a citizen of the United States,' leaving the effect or measure of capacity thus conferred to the judgment of the law. Lord Coke says, that an alien naturalized by act of Parliament is to 'all intents and purposes a natural born subject.' 1 Co. Litt. 129, *a*. It is also said, that naturalization is an adoption of one to be entitled to what,

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[1] Act of Feb. 10, 1855, § 2; Brightly's Dig. 132.
[2] Ante, § 4.
[3] Priest *v.* Cummings, 16 Wend. 617; S. C. 20 Wend. 338.

by birth an Englishman may claim, and takes effect from the birth of the party, but denization from the date of the patent. Viner's Abr. tit. Alien, letter D. Naturalization in Ireland has no effect in England, because it is a fiction of law, and can affect only those consenting to the fiction. When the law makers have power, it has the same effect as a man's birth there. Id. pl. 7,—1 Bac. Abr. tit. Aliens, 130. The position in 1 Black. Comm. 374, is, that naturalization can not be performed, but by act of Parliament; for by this, an alien is put in exactly the same state as if he had been born in the king's legiance. From these and other authorities that might be referred to, it sufficiently appears that the uninheritable blood of the alien becomes purified, and made inheritable by naturalization; and in some respects reaches back to his birth. All previous disabilities, as to taking or transmitting real estate, are at once removed, and any defective or forfeitable title, by reason of alienism, becomes perfect and indefeasible. 1 John. Cas. 398; 7 Wend. 335. Hence children born before naturalization, will inherit the same as those born after, though it is otherwise in case of denization, the effect of which is simply prospective. Lands purchased before may be held and transmitted the same as those acquired afterwards. But the difficulty in sustaining the claim of the plaintiff upon the retroactive operation of her naturalization, and consequent investment of her capacity to take her dower *during the whole period of her coverture*, is, that, *at the time* the husband executed the mortgage, and thereby parted with his title, as in effect he did, as there has since been a foreclosure under it, she was a *disabled person in law* by reason of alienism, and had no capacity, independent of the enabling statutes, to take even an inchoate right of dower. It may be said there was no defective or forfeitable right or title existing, to be forfeited, because there was no right at all vested in her that could attach at the time of the alienation; and therefore, it must attach, if at all, for the first time when the estate is in the hands of innocent third persons. The law which *nihil facit frustra* will give no estate which it does not enable the donee to keep; and, therefore, an alien can take nothing either by descent, curtesy or dower. If he purchase, he may be said to acquire an estate till office found; but he takes nothing by act of law. 7 Cowen, 50; 5 Id. 52; 1 Vent. 417; Park on Dower, 228. The only case that has been referred to, or that I have been able to find after a pretty full examination, where the widow is even said to be entitled to dower out of an estate aliened by the husband, during

the existence of a natural disability to take dower, and consequently before any right attached to the land, is the case of a subsequent naturalization of the wife by act of Parliament. This exception to the general rule, if it exist at all, will be found, I apprehend, to depend upon the peculiar language of the act, together with the omnipotent power admitted by the courts to belong to the statutes of that body. Aliens, in England, are naturalized by private acts of Parliament, which are not published among the general laws. I have not been able to find one of those acts so as to be able to examine the phraseology. It is said by Lord Coke, that if a man take an alien to wife, and afterwards aliens his lands, and after she is made a denizen the husband die, she shall not be endowed, because her capacity and possibility to be endowed come by denization. 'Otherwise,' he says, 'it is, if she were naturalized by act of Parliament.' Co. Litt. 33, a. Viner and Cruise lay down the same position. The latter author remarks, that, if an alien be naturalized by act of Parliament, she then becomes entitled to dower out of all lands whereof her husband was seized during coverture. See, also, 1 Roll. Abr. 675, Park on Dower, 229. Where the incipient right of dower once attaches, and the alienation takes place during its suspension or the existence of a temporary disability, which is subsequently removed before the death of the husband, there the right revives and exists in full force, in contemplation of law from its commencement. Several examples are stated and sanctioned by the court in Menvil's case, 13 Co. 23; such as an alienation before the wife is of an age to be dowable, or during her elopement, or during the existence of an attaint of felony. In all these instances, it is said there is not any incapacity or disability in the person, but only a temporary bar until the proper age, reconcilement, or pardon; that the wives were not incapable by birth, but lawfully entitled to dower by the marriage and seizin; and that, therefore, where the impediment is removed, they shall be endowed. Hargrave's n. 202; Viner, tit. Dower, q. pl. 2; 2 Bac. Abr. tit. Dower, 359; 1 Cruise, 173. But this rule, it said, is not applicable to the case of an alien wife, who has become a *denizen* by letters patent, because at the time of the alienation of the husband, she was absolutely disabled by law from her birth, and the capacity and ability to take dower began with her denization. This distinction adds some weight to the remark before made in respect to the position of Lord Coke, as to the effect of naturalization, namely, that it depends upon no general principle, but exists as an

exception, by reason of the particular wording, and force of the act of Parliament. The case of Fish *v.* Klein, 2 Merivale, 431, may be referred to as an authority for the remark. There K., an alien, had sold and conveyed certain premises, and an act of naturalization was procured to perfect the title in the grantee. The language of the act was 'that the said F. K. shall be, and is thereby from thenceforth naturalized,' &c. It was contended that it could not establish retrospectively an invalid title. The master of the rolls concurred in this view, and held that it did not operate to confirm the title in the grantee; in other words, that it did not invest K. retrospectively with a capacity to hold and convey real estate. It is stated in a note to the case that the vendors were desirous of having retrospective words introduced into the act, but that they found it was impracticable to depart from the common form. The case at least shows, what might well be supposed without it, that the effect of an act of naturalization depends upon the language of it; and that an express clause for this purpose is essential to its retroactive operation, in order to vest a disabled person with an antecedent interest in real estate."

56. In the Court of Errors, also, where the case was taken on error to the Supreme Court, elaborate opinions were delivered by Chancellor Walworth and Senator Verplanck, concurring with the Supreme Court in the conclusion to which it arrived as to the effect of naturalization under the laws of Congress, and devoting to the subject a very considerable share of attention.[1] The following extract is from the opinion of the chancellor: "The effect of a statutory naturalization in England, in overreaching previous vested rights, depends upon the omnipotence which has been ascribed to an act of Parliament; in which, at some of the earlier periods of English history, a due regard was not always paid to the rights of third parties who had not petitioned for the passing of the act. These private acts of naturalization are seldom found in the printed collection of English statutes; but by reference to one which is published by Mr. Chitty as the common form of such acts, 2 Chit. Com. Law, App. 825, it will be seen that the nature and extent of the rights acquired under it are declared in the act itself, and that the language is very strong to show the intention of the law makers to give it a retrospective operation, not only as to inheritable blood,

[1] Priest *v.* Cummings, 20 Wend. 338.

but also to place the person naturalized in the same situation, both actually and *constructively*, as if he had been a natural born citizen at the moment of his birth. To show that by the common law a mere parliamentary act of naturalization did not necessarily retrospect, without reference to the terms of the act, it is only necessary to refer to the opinion of Lord Hale, in the great case of Collingwood *v.* Pace, 1 Ventr. 419. He says: 'Touching the retrospect of a naturalization, and whether the eldest son, being an alien, naturalized after the death of the father, shall direct the descent to the youngest, depends upon the words of the naturalization, which being by act of Parliament, may by a strange retrospect direct it. But as the naturalization in the case in question is penned, it would not do it; the naturalization hath only respect to what shall be *hereafter*.' I conclude, therefore, that the naturalization of the defendant in error had the same effect as to the rights of property as letters of denization had by the common law, and the same effect as to all other rights that an act of Parliament giving her all the rights of a natural born subject, and without any special provisions to give it a retrospective operation. She therefore had from that time the capacity to take an estate in dower, of and in any lands of which the husband was then seized of an inheritable estate: to take lands by devise or descent from any person capable of conveying or transmitting lands in that manner to her: and to take any other interest in real estate by gift or otherwise to herself, and to sell, alienate, or bequeath the same, or transmit the same to such of her heirs as were capable of taking by descent, as fully as a natural born citizen might do, but not otherwise. Her naturalization, however, did not retrospect so as to deprive the mortgagees of her husband, or those claiming under them, of any right or interest in his lands which they had acquired previous to her naturalization."

57. A portion of the opinion of Senator Verplanck, in the same case, possesses considerable value on account of the comparison which he institutes between the language of the naturalization acts of Congress and that employed in several of the special naturalization acts of England. "I can not agree with the chief justice," he says, "that 'the act of Congress affords no great light to aid us in determining this point in the case.' On the contrary, it strikes me forcibly that the language of our acts of Congress on this subject, points out a strong distinction between the legal operation of the rights of citizenship acquired under them, and that of the naturalization con-

ferred by a British act of Parliament. In the acts of Parliament the operative words are the same with those used in the books; I believe in all cases, certainly in all the cases where I have been able to ascertain the facts—either the more general acts in the statutes at large, or those cited in the reports. It is enacted that the party shall be 'naturalized,' or 'shall be deemed, adjudged and taken to be *a natural born subject*,' as if *born* within the kingdom. Thus in a statute, 33 Henry VIII., 'The children of Thomas Powers and others shall be reputed *natural born subjects*.' In the statute of 7 Anne, c. 5, 'All persons born out of the ligeance of her majesty who shall qualify themselves (&c. as therein provided) shall be deemed, adjudged and taken to be *natural born subjects* of Ireland, to all intents, constructions and purposes, as if they had been born within the said kingdom.' So again, by 2 George III., 25, certain foreign officers and soldiers, who had served in America, are naturalized in the same words, 'to be deemed and adjudged, as if they had been born within the realm.' These seem to be the uniform operative words; and their legal effect, as stated by all the authorities, is, 'that an alien is put in exactly the same state as if he had been born in the king's dominions,' 2 Black. Com. 374; or, in the language of Lord Coke, 'is to all intents and purposes a natural born subject.' From the very words employed, then, (unless there be some restrictive condition added,) every such naturalization must relate back to the time of birth of the individual. The naturalized subject is, in the eye of the English law, one native born. The courts do not, and can not look behind the act of Parliament to prior disabilities. By the omnipotence of Parliament the naturalized alien is to all intents a subject from his birth."

58. In an early case,[1] it had been decided in New York, on the strength of the English authorities which have already been noticed, and apparently without much consideration of the subject, that naturalization in this country has a retroactive effect, and operates to confirm title to real estate granted to an alien before the date of the naturalization. And in Massachusetts, also, thirteen years afterwards, the general rule of the English common law that naturalization of an alien friend places him "upon the same ground as if born a citizen," was said by Chief Justice Parsons to be in force in the

[1] Culverhouse *v.* Beach, 1 John. Cas. 399, decided in 1800.

United States.[1] But the reasoning of the court in Priest *v.* Cummings, and the peculiarities in phraseology distinguishing the English acts of Parliament from the acts of Congress, pointed out by the judges, appear fully to sustain the conclusion arrived at in that case. Decisions in other States are in conformity with this view. In Vaux *v.* Nesbit[2] it is said that "the words of our statutes for naturalizing aliens are evidently prospective," and the point was so ruled by the chancellor. The cases of Wightman *v.* Laborde,[3] Keenan *v.* Keenan,[4] and White *v.* White,[5] are to the same effect. In Labatut *v.* Scmidt[6] the question was left undecided, but it is apparent that the inclination of the court was in the same direction. It may be assumed, therefore, with some degree of confidence, that in the United States, naturalization has no retroactive effect, but in its operation is prospective only.[7]

What persons can not become citizens.

59. The acts of Congress authorizing the naturalization of aliens limit the right to "free white persons," thus excluding from their operation Indians, the inhabitants of Africa and their descendants,[8] and perhaps the natives of Asia.[9] It has been judicially decided in several of the United States that Indians are not citizens, but dis-

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[1] Ainslie *v.* Martin, 9 Mass. R. 454, 460.

[2] Vaux *v.* Nesbit, 1 McCord's (S. C.) Ch. 352.

[3] Wightman *v.* Laborde, 1 Spear, (S. C.) 525.

[4] Keenan *v.* Keenan, 7 Rich. Law R. (S. C.) 345.

[5] White *v.* White, 2 Met. (Ky.) 185.

[6] Labatut *v.* Scmidt, 1 Speer's S. C. Eq. R. 421.

[7] On the subject of naturalization generally, see the following additional authorities: Ex parte Newman, 2 Gallis. 11; Little's case, 2 Browne, 218; Anon. Peters' C. C. R. 457; Spratt *v.* Spratt, 4 Pet. 393; Ex parte Overington, 5 Binn. 371; Richards *v.* McDaniel, 2 Nott & McCord, 351; Campbell *v.* Gordon, 6 Cranch, 176; McDaniel *v.* Richards, 1 McCord, 187; Starke *v.* Chesapeake Ins. Co., 7 Cranch, 420; Ritchie *v.* Putnam, 13 Wend. 524; Granstein's case, 1 Hill, 141; Charles *v.* Monson Man. Co., 17 Pick. 70; Towles' case, 5 Leigh, 743; Ex parte Paul, 7 Hill, 56; Banks *v.* Walker, 3 Barb. Ch. R. 438; Matter of Brownlee, 4 Eng. 191; Ex parte Smith, 8 Blackf. 395; State *v.* Penney, 5 Eng. 621; Brown *v.* Shilling, 9 Md. 74; West *v.* West, 8 Paige, 433.

[8] See Dred Scott *v.* Sandford, 19 How. U. S. 393.

[9] 2 Kent, 72; see The United States *v.* Rogers, 4 How. U. S. 567.

tinct tribes, living under the protection of the government.[1] The Attorney-General of the United States, in 1856, held that while the general statutes of naturalization do not apply to Indians, it was nevertheless clear that they may be naturalized by special act of Congress, or by treaty.[2]

60. Questions not unfrequently arise respecting the proper meaning to be attached to the word "white," as used in the naturalization acts, and what shades and degrees of mixture of color disqualify an alien from application for the benefits of those acts. In Virginia, by the statute of 1785, every person who has one-fourth part or more of negro blood is deemed a mulatto.[3] The rule is the same in Kentucky,[4] Arkansas,[5] and Florida.[6] In Indiana a person possessed of one-eighth or more of negro blood is disqualified from marriage with a white person, and the marriage is void.[7] In South Carolina all persons tinged with negro blood are adjudged mulattoes, and it is further held that mulattoes are not white citizens within the meaning of the law.[8] It is said to be the rule in Louisiana, and in the *code noir* of France for her colonies, that if the admixture of African blood do not exceed the proportion of one-eighth, the person is deemed white,[9] and this was formerly regarded as the proper rule in South Carolina.[10] In North Carolina it is provided that "no free negro, free mulatto, or free person of mixed blood, descended from negro ancestors to the fourth generation inclusive, (though one ancestor of each generation may have been a white person,) shall vote for members of the senate or house of commons."[11] In Tennessee "a negro, mulatto, Indian, or person of mixed blood, descended from negro or Indian ancestors, to the third generation inclusive, though

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[1] Goodell *v.* Jackson, 20 John. 693; Jackson *v.* Wood, 7 John. 290; Hastings *v.* Farmer, 4 Comst. 293; Dole *v.* Irish, 2 Barb. 639; The State *v.* Ross, 7 Yerger, 74; The State *v.* Managers of Elections, 1 Bailey, 215.

[2] Opin. Atto.-Gen. vol. vii. p. 746.

[3] 12 Hen. Stat. at Large, 184; see Code of Va. ch. 103, § 3; Gregory *v.* Baugh, 4 Rand. 611, 631; see Opin. Atto.-Gen. vol. i. p. 506.

[4] 2 Rev. Stat. by Stanton, p. 359; 3 Dana, 359.

[5] Rev. Stat. Ark. 584.

[6] Thompson's Dig. 537.

[7] 2 Rev. Stat. Ind. 1852, p. 361, § 1, sub. 2.

[8] State *v.* Hayes, 1 Bailey, 275; but see White *v.* Tax Collector, 3 Rich. 136–139; State *v.* Cantey, 2 Hill, S. C. 614.

[9] 2 Kent, 9th ed. 72, note; see, also, Bailey *v.* Fiske, 34 Maine, 77.

[10] State *v.* Davis, 2 Bailey, 558.

[11] Rev. Code N. C. 23.

one ancestor of each generation may have been a white person, whether bond or free," is excluded from voting and being a witness in courts of justice against a white man.[1] In Georgia, if a person have less than one-eighth of African blood, he may exercise the rights and privileges of a freeman.[2] Other States have enactments of a similar character. In Ohio the rule is settled, as well under the constitution of 1802 as that of 1851, that all persons nearer white than black, are white persons within the meaning of the word "white" as employed in those instruments.[3]

61. It does not follow, however, that persons of the colored races, because they can not avail themselves of the naturalization laws, nor in any other manner become citizens in the full and appropriate sense of the term, are therefore excluded from all the rights of property. Blacks, whether born free or in bondage, if born under the jurisdiction and allegiance of the United States, are natives and not aliens. They are what the common law terms natural-born subjects. The term "citizen" is not confined to persons enjoying the rights of suffrage. A woman, a minor, a person temporarily incapacitated by pauperism or crime, is a citizen in one sense of the term; that is to say, as distinguished from an alien. And, as a general rule, free persons of color, not subjects of a foreign power, may acquire, hold, devise, and transmit by hereditary descent, real and personal estate. But not being citizens in the full sense of the term, nor capable of becoming such under existing laws, they are subject to such disabilities as the States respectively may deem it expedient to prescribe.[4] Questions, important in their results, and sometimes pregnant with difficulty, occasionally grow out of the discordant legislation of the different States on the subject of citizenship, and the conflicting views of their judiciary in giving an interpretation to the word "white," with reference to that clause of the Constitution of the United States which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." It is said by some of the commentators on the

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[1] Con. Tenn. art. 4, § 1; Code Tenn. § 3808; see The State v. Clairborne, Meigs, 331.

[2] T. R. R. Cobb's New Dig. 531.

[3] Williams v. School Directors, Wright's Rep. 579; Polly Gray v. The State, 4 Ohio, 353; Thacker v. Hawk, 11 Ohio, 376; Chalmers v. Stewart, Ibid. 386; Jeffries v. Ankeny, Ibid. 372, 375; Lane v. Baker, 12 Ohio, 237; Stewart v. Southard, 17 Ohio, 402; Anderson v. Millikin, 9 Ohio State, 568.

[4] 2 Kent, 258, note; see Opin. Atto.-Gen. vol. iv. p. 147, and vol. vii. p. 746.

Constitution, that every citizen of a State is, *ipso facto*, a citizen of the United States,[1] but in this they have been pronounced clearly mistaken.[2] And it is said to be certain that, by the legislation of some of the States, persons are citizens there who are not citizens of the United States. At the same time it is conceded to be hazardous to deny all authority to those legislative acts of the different States which define the term "white man," and thus do in fact determine, as to Africans, the dividing line between incapacity and capacity for citizenship of the given State, and perhaps of the United States.[3] The important and perplexing questions thus arising must be left to future judicial inquiry and determination.

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[1] Story on the Con. sec. 1687; Rawle on the Constitution, p. 85.

[2] Opinions Atto.-Gen. U. S. vol. vii. pp. 751, 752.

[3] Ibid.

CHAPTER X.

OF THE NATURE AND QUALITIES OF THE PROPERTY SUBJECT TO DOWER.

§ 1. Introductory.
2. Lands and tenements.
3. Hereditaments real.
4–10. Mines and quarries.
11–24. Wild lands.
§ 25–39. Shares in corporations.
40. Water granted for hydraulic purposes.
41, 42. Slaves.

1. In considering the subject of dower, it is important to keep in view the distinction between the *class* or species of property upon which that right may attach, and the *estate* or degree of interest which must exist therein as a requisite to its inception. For example, *land* is a species of property which, as a general rule, is subject to dower; but it is not upon every *interest* in land that this estate will attach, even though such interest may, in the full legal acceptation of the term, be regarded as real estate. Thus, an estate for life is an interest in land; it is denominated real property; but according to the rules of the common law it is not subject to dower.[1] Again, there are classes of property which are not subject to dower because they are strictly *personal* in their nature, and with regard to these it makes no difference what the extent of the interest or the nature of the title may be. The inquiry, therefore, in respect of the property which may be subject to dower, involves considerations of a twofold character. First, as to the nature and qualities of the property itself, irrespective of the title by which it is held; and secondly, as to the interest or estate which it is essential should exist therein, in order to confer, as an incident thereof, the right of dower. One branch of this inquiry relates to the *Res* or Thing; the other to the extent and duration of the right to the enjoyment thereof. To the consideration of the former the present chapter will be devoted.

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[1] See post, ch. 17.

Lands and tenements.

2. The word *Dower* is a technical term, and in its legal signification, as well as in its popular sense, is ordinarily understood to be applicable only to real property.[1] Littleton, in defining the estate of dower, says: "Tenant in dower is where a man is seized of certain *lands* or *tenements*," &c.[2] Chief Justice Mansfield has remarked on this passage that Lord Coke makes no attempt to explain what is land, or what is a tenement, apparently impressed with the idea that the legal import of these terms was well known.[3] The word "tenements" is evidently here used by Littleton to denote such real property as does not necessarily lie in tenure; for, although in its largest and most comprehensive sense the term includes corporeal inheritances, yet the connection with the word "lands," in which it is employed in the present instance, would seem to direct its application more particularly to that species or right of property "which issues out of, or is annexed to, or is exercisable within," corporeal inheritances capable of actual seizin, and which, therefore, notwithstanding its unsubstantial and ideal nature, if the right be permanent, is impressed with the character of real estate. The term is properly applicable only to such property as is classed with realty, whereas the word "hereditaments," which is omitted by Littleton in his definition of the estate of dower, has a more extended signification, and applies to rights purely of a personal nature as well as to those which savor of the realty.

Hereditaments real.

3. All hereditaments, whether corporeal or incorporeal, which savor of the realty, are, as a general rule, subject to dower.[4] The following instances, in which the right of dower in this description of property is recognized, are collected from the old books of the

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[1] Perkins *v.* Little, 1 Greenl. R. 148; Brockett *v.* Leighton, 7 Greenl. R. 383; Dow *v.* Dow, 36 Maine, 211; Lamar *v.* Scott, 8 Strobh. 562; Hill *v.* Mitchell, 5 Ark. 608, 611.

[2] Litt. sec. 36; Perk. sec. 347.

[3] Stoughton *v.* Leigh, 1 Taunt. 409.

[4] Co. Litt. 6, a., 19, b., 20, a., 154, a.; Watk. Conv. (20 Law Lib.) 38; Park, Dow. 110, 111; Buckeridge *v.* Ingram, 2 Vesey, Jr. 663.

law.[1] Dower may be had of a manor;[2] of an advowson, in gross or appendant;[3] of tithes, pensions, or other ecclesiastical profits which come to the crown by the statutes of 27 Hen. VIII., 31 Hen. VIII., and 1 Ed. VI.[4] A rent service,[5] rent charge,[6] and rent seck[7] are also subject to dower. So of a common certain, in gross or appendant.[8] And the widow has been held dowable of franchises, parcel of an honor.[9] And of all tenures of which a woman is capable.[10] But with regard to those things which usually lie in appendancy, as a common appendant, an advowson appendant, franchises appendant, and the like, it is to be remarked that they are not things to which the widow can make an independent, substantive claim for dower, for that would be to sever the appendancy. The right of dower in hereditaments of this description, many of which are indivisible in their nature, exists only where she is entitled to be endowed of the entirety of the thing to which they are appendant.[11] All liberties and profits savoring of the realty in which the husband is seized of an estate of inheritance, by the common law are also subject to dower.[12] Thus, the widow has been held dowable of a piscary;[13] of offices,[14] such as the office of a bailiff or parker,[15] the office of the marshalsea of the King's Bench,[16] and of the custody of the jail of

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[1] Park, Dow. 111, 112.

[2] Bragg's case, Godb. 135; Gouldsb. 37.

[3] Fitzh. N. B. 148–50; Co. Litt. 32, a.; Perk. sec. 342, 343; Howard *v.* Cavendish, Cro. Jac. 621.

[4] Co. Litt. 159, a., 32, a.; Thynn *v.* Thynn, Style's R. 99.

[5] Perk. sec. 345. [6] Perk. sec. 347.

[7] Co. Litt. 32, a.; Perk. sec. 347.

[8] Perk. sec. 342; Fitzh. N. B. 148. See Godb. 21.

[9] Howard *v.* Cavendish, Cro. Jac. 622.

[10] Thynn *v.* Thynn, Style's R. 69.

[11] Hughes, Writs, 192; Park, Dow. 114, 115. Chancellor Kent remarks that "dower attaches to all real hereditaments, such as rents, commons in gross or appendant, and piscary, provided the husband was seized of an estate of inheritance in the same. But in these cases the wife is dowable *only by reason of her right to be endowed of the estate to which they are appendant.*" 4 Com. 40, 41. This proposition does not appear to be stated with the usual precision and accuracy of that profound jurist. There are hereditaments real upon which the widow may make a substantive claim for dower, although she is not entitled to be endowed of the lands from which they issue. A rent-charge held in fee is an instance of this. Vide *infra*, ch. 18.

[12] Park on Dower, 112.

[13] Co. Litt. 32, a.; Bracton, 98, 208; Brit. 247; Flet. 1, 5, c. 23.

[14] Style's Pr. Reg. 122; Fitzh. N. B. 18, 149.

[15] Co. Litt. 32, a.; Fitzh. N. B. 8, (K) marg.; Perk. sec. 342; Gilbert on Dower, 371.

[16] Co. Litt. 32, a.; Fitzh. N. B. 8, (K) marg. See Hughes on Writs, 192.

Westminster Abbey.[1] And she has been held dowable of a fair;[2] a market;[3] a dove-house;[4] of courts, fines, heriots, &c.;[5] and of a mill.[6] And it is laid down by Perkins, that "if a man grant to me and my heirs to take yearly so many estovers in his wood in Dale, as I and my heirs will burn in the same manor of Dale, and I take a wife and die, my wife shall not have dower of the estovers;"[7] but "if a man grant to me and my heirs to take yearly out of his meadow three loads of hay, and I take a wife and die, my wife shall have dower thereof."[8] He adds, however, "*tamen quære.*" In respect of the doubt thus suggested by Perkins, Mr. Greening, in a note to this section, remarks: "It is difficult to imagine any ground for this *quære*, unless from an apprehension that such a grant gave a mere personal privilege; but it would give an estate in fee simple;[9] and the profit being a hereditament lying in *prendre*, the wife is dowable of it as of a common in gross, or tithes."[10]

In Kentucky it has been held that where the husband dies seized of a ferry, the widow may be endowed of one-third the profits, or of the use of it for a third of the time, in alternate periods.[11]

Mines and quarries.

4. In the early case of Comyn *v.* Kyneto,[12] decided in the 2d of James I., it was insisted in argument, "that an ejectment lies not of a coal mine because it is *quoddam proficuum subtus solum*, and an *habere facias possessionem* can not be had thereof." But the objection was not allowed; "for," said the court, "it is a profit well known, and whereof the law takes *bon conusance*, and therefore an ejectment well lies thereof. And Tanfield said it was adjudged in this court in the case of Mr. Wyld, that an ejectment lies of a boyllary of salt; and it was cited to be likewise here adjudged between

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[1] Co. Litt. 32, a.; Theloal. Dig. 67, lib. viii. cap. 5, sec. 2.

[2] Co. Litt. 32, a.; Fitzh. N. B. 8, (K) n.; Bro. Ass. pl. 471; Fitzh. Sci. Fa. 122; Gilb. Uses, 371.

[3] Gilb. Uses, 371; Fitzh. N. B. 8, (K) n. [4] Co. Litt. 32, a. [5] Ibid.

[6] Perk. sec. 842; Gilb. Uses, 371; Fitzh. N. B. 8, (K) a. [7] Sec. 841.

[8] Sec. 843, referring to the following authorities: 12 Ed. 3, Dower, 157; 11 Ed. 2, Dower, 85.

[9] Stoughton *v.* Leigh, 1 Taunt. 402.

[10] Note to sec. 843, Greening's ed. of Perkins.

[11] Stevens *v.* Stevens, 3 Dana, 373.

[12] Comyn *v.* Kyneto, Cro. Jac. 150.

Lawson and Williams that this action will lie for a coal mine." It has been remarked that this is the first case in which it was held that ejectment would lie for a coal mine.[1] On the strength of this decision, and the additional authorities referred to in the note,[2] Mr. Burton has not hesitated to state it as a clear proposition in law that mines may be made the subject of conveyance by livery, if actually opened; and that an interest in mines unopened may exist independently of any estate in the surface of the land.[3]

5. It has accordingly been held, and is generally understood to be the law, that dower may exist in mines or quarries if they have been opened during the lifetime of the husband. In the case of Thynn *v.* Thynn,[4] which arose in the 23 of Charles I. (1648,) dower had been assigned in a stone quarry, after judgment by default. Upon writ of error brought to reverse the judgment, and set aside the proceedings under which the assignment had been made, it was contended, among other points raised in support of the writ of error, that dower could not be had in a quarry of stones. Holhead, for the plaintiff in error, argued as follows: "Here is a demand of dower of such things whereof dower lies not, viz. of a quarry of stones, and it appears not that the quarry was open in the life of her husband; and if it were, yet it is improper to demand it by the name of a quarry." To which Hales, for the widow, replied: "The word quarry is a good word, and well known what it means: for *quarrera* is an old well known Latin word for it, and she is as well dowable of it as of a mine of coals, and it shall be intended to be open, because she demands it by the name of a quarry." On a subsequent argument, Twisden, of counsel for the plaintiff in error, pressed the objection still further: "A third exception was that dower is recovered of a thing not dowable, viz. of a quarry of stones, for if she would be dowable of a quarry of stones, this would be to the destruction of the inheritance, and indeed it is impossible, for a quarry of stones can not be divided by metes and bounds, which must be if she should be endowed of it. And also if the mine and quarry should be divided,

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[1] In Whittington *v.* Andrews, 1 Show. 364; S. C. 1 Salk. 255; 4 Mod. 143.

[2] Co. Litt. 6, a.; Prest. Touch. 96; Barnes *v.* Mawson, 1 M. & S. 77; E. of Cardigan *v.* Armitage, 2 B. & C. 197; Seaman *v.* Vawdrey, 16 Ves. Jr. 390.

[3] Burton on Real Prop. sec. 1164, (23 Law Lib.) This doctrine appears to be well established both in England and the United States. See 1 Washb. R. P. p. 5, § 12, and authorities there cited.

[4] Thynn *v.* Thynn, Style's Pr. Reg. 67, 68.

the tenant of the land would be prejudiced; and that a quarry can not be divided see Cooks' Lit. 164, and so it was adjudged 2 lac. upon a reference to the judges." In answer to this objection, Maynard, for the defendant in error, "argued that a feme is dowable of a quarry, and that it may be divided by metes and bounds, for it may be divided by the profits, although it can not be divided by the quantity of the thing."[1] Although the case was argued at six different times upon the various questions involved, it does not appear to have ever come to a decision upon the merits. According to the report given by Styles, it finally went off on a technical objection to the writ of error.[2] In the case of Hoby *v.* Hoby,[3] decided in 1688, the right of a widow to be endowed of a coal mine was recognized without question; and in the more recent case of Stoughton *v.* Leigh,[4] it became necessary for the court to consider very fully the rights of a dowress in property of this description. In that case the husband was the owner of several mines and strata of lead and coal, some of them in lands of which he was himself seized in fee, and others in lands of third persons. In the latter the mines and strata had been granted to him in fee simple. Some of these mines and strata had been opened and wrought, and others not. On a case sent from the Court of Chancery to the Court of Common Pleas, the judges of the latter court certified that the widow was dowable of all her husband's mines of lead and coal, as well of those which were in his own landed estates, as of the mines and strata of lead, or lead ore, and coal, in the lands of other persons, which had in fact been opened and wrought before his death, and wherein he had an estate of inheritance; and that her right to be endowed of them had no dependence upon the subsequent continuance or discontinuance of working them, either by the husband in his lifetime, or by those claiming under him since his death. The report of this case is quite full, and it is usually referred to as the leading case upon the subject.[5]

6. Mr. Park, in his work on Dower, has the following observations with regard to some of the points ruled in the foregoing case: "It could scarcely be intended by the court that the widow was dowable of the mines in her husband's own lands as *substantive* heredita-

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[1] Page 99.
[2] Sty. 67, 77, 91, 98, 101, 143.
[3] Hoby *v.* Hoby, 1 Vern. 218.
[4] Stoughton *v.* Leigh, 1 Taunt. 402.
[5] See Park on Dower, 116; 2 Roper, Husb. and Wife, 342, 343.

ments. Those mines were parcel of the inheritance, and her life interest in the lands themselves, or rather in her third part of them, carried with it the legal right to the benefit of such of the mines included in that third part as were opened. That this was all the court meant to express might be gleaned from their observations upon the mode in which the assignment was to be made by the sheriff of the husband's own lands. 'It was not absolutely necessary,' they remarked, 'that he should assign to her any of the open mines themselves, or any portions of them. The third part in value which he should assign to her might consist wholly of land set out by metes and bounds, and containing none of the open mines. Or he might include any of the mines themselves in the assignment to the widow, describing them specifically, if the particular lands in which they should lie should not also be assigned; but if those lands should be included in the assignment, the open mines within them might, but were not necessarily to be so described, *being part of the land* itself which was assigned; and as the working of the open mines was not waste, the tenant in dower might work such mines for her own exclusive profit;' *i.e.* by directing separate alternate enjoyment for short periods. These observations seem fully to admit, what the writer apprehends to be without doubt the real state of the law, that the wife is dowable of opened mines in her husband's lands as parcel of the inheritance, and not as distinct and collateral inheritances. Mines in a man's own lands are clearly so far from being distinct inheritances, that they are merely *a mode of enjoyment.* The right to the soil is the right to the profits of it, subject only to such restrictions as the law has imposed upon the owners of particular estates with respect to the mode of enjoying those profits. On the other hand, it is difficult to understand how the admission that the sheriff might assign particular mines *not within the lands* assigned to her, is to be rendered consistent with this view of the law. If the wife is entitled to the benefit of mines in her husband's lands, merely in respect of her interest in the particular lands under which they lie, how can that benefit be extended to mines under other lands of her husband to which she is a stranger? As well might it be said that the sheriff might endow her of a clump of trees in lands which are not included in the assignment of her dower. If she is endowed of the land itself upon which the trees grow, she has that interest in the trees which the law allows to a tenant for life, but if the land is not assigned to her, she can not be substantively endowed of the trees.

The mines being equally parcel of the inheritance as the trees, are in the same predicament. These considerations will probably account for the circumstance which struck the court with some surprise that no mention was made of mines by Lord Coke in enumerating the species of inheritance of which a woman shall be endowed. . . . With regard to the mines and strata under the lands of other persons, the subject might, perhaps, have merited further consideration. Assuming the law to be that an interest of that nature, though in itself perishable, is yet capable of being granted in fee, it may be made a question, if a woman is dowable in any case of such property, how the circumstance of the mines being opened or unopened can make any difference; the analogy wholly failing between such property, and mines in the lands of her husband, which are parcel of the inheritance. In the latter case her right to work *opened* mines arises as a mode of enjoyment, to which, in respect to her interest in the lands, she is entitled; while the denial of her right to open the mines not wrought by her husband, arises solely from the restricted nature of her interest in the lands. On this point the law was well stated by Lens, Sergeant, in argument on this case: 'Where mines have been actually wrought as part of the estate of the husband, they may be collaterally subject to dower with the rest of his real property. But mines have never been assigned as in their own nature liable to dower. The interest of tenant in dower is a life estate only; but an interest which can enable the possessor to open mines must be an estate of inheritance, for it is an act of waste in a tenant for life.' This doctrine is wholly inapplicable to the case of grants of strata in the lands of a third person to the husband in fee. In that case working the mine is the only mode of enjoyment of which the property is capable, and if such a property were granted to A. for life, remainder to B. in fee, it would be difficult to understand how B. could maintain waste against A. for opening the mine, when it is obvious that A. is to have some interest, and the denying his right to open the mine, is in effect denying that that interest is to confer any species of enjoyment. If mines are unopened in a man's own lands, nothing short of an ownership of the inheritance will enable him to open and work these mines; but if he grants the mines substantively to another, it would be a new doctrine to contend that he must grant an estate of inheritance in order to confer a right of taking the benefit of the grantee."[1]

[1] Park, Dow. 117-20.

7. However well founded this criticism may appear, it is to be remarked that the rule, as declared in Stoughton *v.* Leigh, has been generally approved by the text writers, and recognized in practice by the courts.[1]

8. The first case in the United States in which the question arose appears to be that of Coates *v.* Cheever.[2] In that case the controversy was respecting the right of a widow to be endowed of a rich and valuable bed of iron ore contained in the lands of the husband, which had been opened and worked by him, but had afterwards been abandoned and partially filled up during his lifetime. It appeared, however, that the vein was capable of being rendered very productive, and in reality constituted the chief value of the premises. The question was considered at length by the court, and the claim for dower sustained. Stoughton *v.* Leigh was referred to in the discussion, and received the unqualified indorsement of the court.

9. In Billings *v.* Taylor,[3] a husband died seized of a tract of land of about fifty acres, four of which contained a slate quarry partially above ground. One-quarter of an acre of the quarry had been dug over by taking a section of ten or twelve feet square, and so going down to the usual depth, and then beginning on the surface again. It was held that the widow was entitled to dower in the whole quarry. In Maine, upon the same principle, lime quarries are held subject to dower,[4] and it has been decided in Virginia that it is not waste for a tenant in dower to take coal to any extent from a mine already opened, or to sink new shafts in the same veins of coal. It was further determined that she may penetrate through a seam already opened, and dig into a new seam that lies under the first.[5]

10. The reports are barren of adjudged cases upon this subject, but so far as any are to be found, they agree in the proposition that if mines be unopened during the lifetime of the husband, they are not subject to dower. But if once opened, it is not necessary that

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[1] Macq. H. & W. 170; 1 Cruise, tit. 6, ch. 2, §§ 1–32; Burton on Real Prop. § 1164; Smith on Real and Per. Pr. 187; 4 Kent, 41; 1 Washb. on Real Prop. p. 5, § 12; 1 Hilliard on Real Prop. 2d ed. p. 140, § 9; The King *v.* Dunsford, 2 Adol. & El. 568, 593; Quarrington *v.* Arthur, 10 M. & W. 335.

[2] Coates *v.* Cheever, 1 Cow. 460.

[3] Billings *v.* Taylor, 10 Pick. 460.

[4] Moore *v.* Rollins, 45 Maine, 493.

[5] Findlay *v.* Smith, 6 Munf. 134; Crouch *v.* Puryear, 1 Rand. 258; accord. Spencer *v.* Scurr, Master of the Rolls Court, 10 Weekly Rep. 878; 25 Month. Law Rep. 121.

the husband should have worked them down to the time of his death; nor that the working should be continued by the heir. This point is expressly ruled in Stoughton *v.* Leigh and Coates *v.* Cheever, and this holding does not appear to have been seriously called in question since the determination of those cases.[1] The distinction taken between mines which have been opened and those which have not, appears to rest upon the theory that it is an act of *waste* for a dowress, or any other tenant for life, to *open* mines, and therefore it is not permissible for her to do so. Bracton states it as one of the principles regulating the right of dower, that a widow can not claim a thing in dower unless she may use and enjoy it *sine vasto exilio et destructione.*[2] But Mr. Burton gives entirely a different reason for this rule. An interest in unopened mines on the lands of another, unaccompanied by any estate in the surface of the land, and where no possession has been taken, he likens to an estate in remainder, and supposes that no right of dower attaches upon such interest, upon the same principle that it is excluded from estates in remainder.[3]

Wild lands.

11. In some of the States it is provided by law that wild lands shall not be subject to dower. Thus, the Revised Statutes of Massachusetts contain the following provision:—

> A widow shall not be endowed of wild lands of which her husband shall die seized, nor of wild lands conveyed by him, although they should be afterwards cleared; but this shall not bar her right of dower in any wood lot, or other land used with the farm or dwelling house, although such wood lot or other land should have never been cleared.[4]

12. But the question whether a widow was entitled to dower in unimproved lands held separately from improved estates, was mooted in Massachusetts prior to the passage of the act above referred to, and appears to have created much perplexity in the minds of the judges. In the case of Conner *v.* Shepherd,[5] where this point came

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[1] See authorities cited ante, § 7, note 1; and Moore *v.* Rollins, 45 Maine, 493.

[2] Brac. 816, pl. 1, 2; accord. Gilb. on Dower, 390, 391.

[3] Burton, Real Prop. § 1164. See post, ch. 15.

[4] Rev. Stat. Mass. (1836,) p. 410, ch. 60, § 12; Gen. Stat. Mass. (1860,) p. 470, ch. 90, § 12.

[5] Conner *v.* Shepherd, 15 Mass. 164. But the Supreme Court of Massachusetts, in a case decided in 1783, held that dower was assignable in wild lands. Nash *v.* Baltwood, Story's Pleadings, 366.

up for adjudication, it was determined that lands in a state of nature were not subject to dower. "Upon this question," remarked Parker, Chief Justice, "we have had considerable difficulty. By the common law, the widow is dowable of all the real estate of which her husband was seized during the coverture, with the exception only of a castle erected for public defence, of a common in gross, and some other kinds of estate not known in this country. The question whether forests, parks and other property of a similar nature, are also exceptions, seems never to have occurred: probably because there is no instance in Great Britain, of any such property held separately and distinct from improved and cultivated estates.[1] In this country, on the contrary, there are many large tracts of uncultivated territory owned by individuals, who have no intention of reducing them to a state of improvement, but consider them rather the subjects of speculation and sale, or as a future fund for their posterity, increasing in value with the population and improvements of the country. If dower could be assigned in estates of this nature, the views of those who purchase such property would be obstructed; and an impediment to their transfer would be created, and in many instances the inheritance would be prejudiced, without any actual advantage to the widow, to whom the dower might be assigned. For, according to the principles of the common law, her estate would be forfeited if she were to cut down any of the trees valuable as timber. It would seem, too, that the mere change of the property from wilderness to arable or pasture land, by cutting down the wood and clearing up the land, might be considered as waste; for the alteration of the property, even if it become thereby more valuable, would subject the estate in dower to forfeiture; the heir having a right to the inheritance in the same character it was left by the ancestor. It is not an extravagant supposition that land actually in a state of nature may, in a country fast increasing in its population, be more valuable than the same land would be with that sort of cultivation which a tenant for life would be likely to bestow upon it; and then the very clearing of the land for the purpose of getting the greatest crops with the least labor, which is all that could be expected from a tenant in dower, would be actually, as well as technically, waste of the inheritance. There would seem, then, to be no reason for allowing dower to the widow in

[1] Perkins says "a woman shall be endowed of lands, tenements, *woods*, &c.;" sec. 347.

property of this kind. If she did not improve the land, the dower would be wholly useless; if she did improve it, she would be exposed to disputes with the heir, and to the forfeiture of her estate after having expended her substance upon it. But this is not all. It is well understood by the common law, and the principle has been repeatedly settled in this court, that the dower of the widow is not to be assigned so as to give her one third of the land in quantity, but so that she may enjoy one third of the rents and profits or income of the estate. Now of a lot of wild land, not connected with a cultivated farm, there are no rents and profits. On the contrary, it is an expense to the owner, by reason of the taxes. The rule, therefore, by which dower is to be assigned, can not be applied to such property. . . . Upon the whole, seeing no possible benefit to the widow from an assignment of dower in such property; and on the contrary believing that it would operate as a clog upon estates designed to be the subject of transfer; and finding that the principles upon which the estate of dower rests at common law are not applicable to a case of the kind before us, we feel constrained to say that the demandant can not maintain her action."

13. The question again came up in a somewhat different form in Webb *v.* Townsend.[1] In that case the lands in which dower was demanded had been alienated by the husband while they were in a state of nature, but were subsequently improved and brought under cultivation by the grantee of the husband. Counsel for the demandant attempted to distinguish this case from Conner *v.* Shepherd upon the ground that at the date of the husband's death the lands were improved, and might therefore be enjoyed by the widow without the commission of waste. But the court denied the claim of the widow, holding, first, in conformity to the views expressed in Conner *v.* Shepherd, that unimproved lands were not subject to dower; and secondly, that the demandant could have no benefit from the improvements or labors of the purchaser. "It has been determined," said the court, "that when land of which a widow is dowable shall have been increased in value by a grantee of the husband, her dower shall be assigned according to the value of the land when alienated. In the case before us, when the alienation took place, the land was in a state of nature, and the demandant could not have had dower. At the time when dower was demanded, the land had become a culti-

[1] Webb *v.* Townsend, 1 Pick. 21.

vated farm, but altogether by the labor of the grantee or those who claim under him."

14. The case of White *v.* Willis[1] presented the question whether dower is demandable in a lot of wild land where it is used in connection with the dwelling-house and improved land of the husband. The point was determined in the affirmative. The court say: "The plea sets forth a good bar, but the replication avoids it, by saying that the woodland was used as an appendage to the dwelling-house and cultivated land for the purpose of procuring fuel, and timber for repairs. We know of no authority for the suggestion that the dowress has a right to take fire-bote, &c., without an assignment of her dower in the wood lot. This case is distinguished from those heretofore decided respecting dower. The court have limited the disallowance of dower to wild land which is not used with the homestead or with cultivated land."

15. But in White *v.* Cutler,[2] the right of a widow to cut and take wood and timber from woodland assigned her as part of her dower estate, was limited strictly to such wood and timber as were necessary for the supply of that estate, to be actually applied and consumed upon the estate, or for purposes connected with the proper use and enjoyment thereof. In that case, after the assignment of dower, the dwelling-house became untenantable, and was taken down. The widow removed from the premises, and took up her residence in another family, where she was supplied with fuel. It was held that neither the widow nor the lessee of her estate had a right to cut the wood thereon for fuel.

16. In a still later case it was determined that a widow was dowable of land which, at the time it was owned by the husband, was a wood and pasture lot, situated at the distance of a mile from his homestead, and separated therefrom by lands of other persons, but used by him as a pasture appurtenant to the homestead, although such land had since become overrun with bushes, and was not productive. The court were of opinion that land might be cleared of bushes without committing waste, and thus be rendered productive; and they added that land covered with bushes is oftentimes useful for pasturage.[3]

17. The same rule prevails in *Maine*, where the Massachusetts

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[1] White *v.* Willis, 7 Pick. 193. [2] White *v.* Cutler, 17 Pick. 248.
[3] Shattuck *v.* Gregg, 23 Pick. 88.

statute above cited is adopted verbatim.[1] The right to dower in land used for the purposes of pasture and fuel at the time of the alienation by the husband, was sustained in the case of Mosher *v.* Mosher.[2] But in Khun *v.* Kaler,[3] where the husband had conveyed a portion of his woodland during coverture, reserving, however, sufficient to supply wood for fuel and other purposes connected with the usual and proper enjoyment of the estate, dower was refused in the portion so conveyed.

18. In Stevens *v.* Owen[4] this case arose: During the coverture the husband was seized in fee of a five-acre lot of land, partially improved and partly covered with bushes, and unfenced, and while in this condition the lot was conveyed by the husband. It was decided by the court that if wild lands lie contiguous to, and are in any manner used with an improved estate, as for fuel, fencing, repairs, pasturing, &c., they are subject to dower, and upon this principle dower was awarded the widow in the lot above mentioned.

19. An early New Hampshire statute was substantially the same as the statutes of Massachusetts and Maine.[5] By the first section it was provided that no widow "shall be entitled to dower in any lands whereof her husband was seized during the marriage, unless such lands were in *a state of cultivation* during such seizin, or were used and kept as a wood or timber lot, and considered as appurtenant to some farm or tenement at the same time owned by the husband of such woman." The second section declared "that when any person, who in his lifetime was seized of lands or tenements *cultivated or improved*, and shall lose or part with his title therein, and shall afterwards die leaving a widow having right of dower in the same, such widow shall be endowed of one third part in value of such land, with the buildings thereon, according to the value thereof at the time such husband so lost or parted with his title thereto; and such widow shall also be endowed of such part of said lands as will produce an income equal to one third part of the income which such lands produced at the time such husband lost or parted with the title therein, and not otherwise."

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[1] Rev. Stat. Maine, (1840–41,) 391, ch. 95, § 2; Rev. Stat. Maine, (1857,) p. 605, ch. 103, § 2.

[2] Mosher *v.* Mosher, 3 Shep. 371; approved in Durham *v.* Angier, 20 Maine, 242.

[3] Khun *v.* Kaler, 2 Shep. 409.

[4] Stevens *v.* Owen, 12 Shep. 94.

[5] 1 N. H. Laws, 190, §§ 1, 2; accord. Rev. Stat. 1842, ch. 165, §§ 4, 7; N. H. Comp. Laws, (1853,) p. 420, ch. 175, §§ 4, 5.

20. Under this statute a question arose whether it was necessary that the lands in which dower was claimed should not only be in a state of cultivation, but also in a condition to yield a net income. The difficulty as to the true construction of the act originated in the peculiar wording of the second section, directing that the widow should be endowed of such part of the lands as would produce an annual income equal to one-third part of the income which the entire tract produced at the time the husband parted with his title thereto, and not otherwise. The court were of opinion that it was not necessary that the lands should produce any income in order to entitle the widow to dower therein; that it was only necessary that they should be in a state of cultivation, which condition was defined to be that which is converse to a state of nature; "and whenever lands have been wrought with a view to the production of a crop," observed the court, "they must be considered as becoming and continuing in a state of cultivation, until abandoned for every purpose of agriculture, and designedly permitted to revert to a condition similar to their original one."[1] By the present statute of New Hampshire the dowress is entitled to take fuel to burn in her dwelling-house, although she do not reside on the land.[2]

21. But in many of the States a different rule exists, and dower is allowed in all the lands of the husband, whether they have been improved or are in a state of nature. The old Virginia colony act of 1664 expressly placed cleared land and woodland upon the same footing in this respect,[3] and the adjudged cases are to the same effect. "The law of waste, in its application here," said Cabell, Judge, in Findlay *v.* Smith,[4] "varies and accommodates itself to the situation of our new and unsettled country." In the same case, Roane, Judge, expressed himself as follows: "In considering what is waste in this country, it is to be remarked that the common law, by which it is regulated, adapts itself in this, as in other cases, to the varied situation and circumstances of the country. That can not be waste, for example, in an entire woodland country, which would be so in a cleared one. The contrary doctrine would starve a widow, for example, who could not subsist without cultivating her dower land,

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[1] Johnson *v.* Perley, 2 N. H. 56.

[2] N. H. Comp. Stat. (1853,) p. 420, ch. 175, § 7.

[3] 2 Hen. Stat. at Large, 212; ante, ch. 2, § 4.

[4] Findlay *v.* Smith, 6 Munf. 134.

nor cultivate it without felling the timber. A clearing of the land in such circumstances would not be a lasting damage to the inheritance, nor a disinherison of him in the remainder, which is the true definition of waste. It would, on the contrary, be beneficial."[1]

22. In Ohio the question was first presented in the case of Allen *v.* McCoy,[2] and was argued with much ability and research by the counsel engaged. The court manifested no hesitancy in determining the point in favor of the widow. "The second question," they observed, in passing upon this phase of the case, "in what seems to the court the appropriate order for considering the points in the case, is, can the widow claim to be endowed of lands lying wild and uncleared of timber, during the husband's seizin, and at the time of the alienation? This question is raised upon a technical nicety of the common law. One of the incidents attached to a dower estate is its forfeiture for waste, and a prominent act of waste is converting woodland into arable. Thus, it is argued, dower in wild lands is a useless property. It can be of no value to the widow in its wild state, and it can not be reduced to cultivation without forfeiting the estate itself. This argument is too subtle to be received as premises for the conclusion it seeks to enforce. The common law doctrine of waste has never been recognized in Ohio, either as an incident of title, or as affording a remedy for wrong."

23. So in Michigan,[3] Kentucky,[4] Illinois,[5] and Georgia,[6] the widow is held to have a right of dower in the wild, uncultivated lands of her husband. In New York, in Walker *v.* Schuyler,[7] dower was claimed in lands that were wild and uncultivated at the time they were aliened, and it seems not to have been doubted that the right attached. In Pennsylvania, tenants in dower are allowed to clear wild lands, not exceeding a just proportion of the whole tract.[8]

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[1] Accord. Macauley *v.* Dismal Swamp Land Co., 2 Rob. 507.

[2] Allen *v.* McCoy, 8 Ohio Rep. 418.

[3] Campbell, Appellant, 2 Doug. 141.

[4] Hickman *v.* Irvine, 3 Dana, 121.

[5] Schnebly *v.* Schnebly, 26 Ill. 116. But where unimproved lands were situate some three miles distant from the farm occupied by the husband, it was held that the widow was not authorized to retain possession thereof under the provision of the statute giving her the right to occupy the dwelling-house, plantation, &c., until her dower was assigned, free of rent; Hoots *v.* Graham, 23 Ill. 81.

[6] Chapman *v.* Schroeder, 10 Geo. 321.

[7] Walker *v.* Schuyler, 10 Wend. 480; see, also, Jackson *v.* Brownson, 7 John. 227; Jackson *v.* Sellick, 8 John. 202.

[8] Hastings *v.* Cruncleton, 3 Yeates, 261.

"It would be an outrage on common sense," the court remarked in the case cited, "to suppose that what would be waste in England could receive that appellation here." In North Carolina the dowress may convert timber into staves and shingles, where such has been the ordinary, and is the only beneficial use she can make of the land.[1] It was held in the case referred to that "it is not waste to clear tillable land for the necessary support of a family, though timber be destroyed in the clearing, nor to cut wood for fences." In Tennessee the widow may cut down timber for any necessary uses, if enough be left for permanent use, and the estate is not materially injured.[2] So it has been held in that State that a widow may cut timber on one part of the land to fence another part, although the reversion of the respective parcels belongs to different persons.[3] In Rhode Island dower is allowed in woodland by express statute. The commissioners to assign dower are required to estimate the annual growth of the trees on the premises, and set off one-third thereof, either by the number of cords or quantity of land.[4]

24. In the absence of any express legislation on the subject, the question whether a widow is dowable of wild lands, depends very much upon the extent to which the courts have gone in adopting the rigid rules of the common law respecting the doctrine of waste. In several of the older States the common law is held to be in force. In others, and perhaps in a majority of them, the strict rule obtaining in a highly cultivated country like England, is considered inapplicable in a comparatively new and unsettled country like ours, and is therefore received with such modification as properly adapts it to the condition of things existing with us. And it may be here stated, as a general principle, that in those States where a tenant for life is authorized, either by express statute, or by a judicial exposition of the law of waste, to clear a reasonable proportion of wild lands, and fit them for cultivation, a widow is entitled to be endowed of such lands, and to exercise thereon all the rights and privileges commonly permitted to tenants for life.[5]

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[1] Ballentine *v.* Poyner, 2 Hayw. 110; see, also, Parkins *v.* Coxe, Ibid. 339.

[2] Wilson *v.* Smith, 5 Yerg. 379; see Combs *v.* Young, 4 Yerg. 218.

[3] Owen *v.* Hyde, 6 Yerg. 334.

[4] R. I. Stat. (1840,) 2022; Public Laws of R. I. (1844,) p. 188, § 2.

[5] 1 Hilliard, Real Prop. 2d ed. 141, 142, § 12.

Shares in corporations.

25. Shares in incorporated companies are generally considered personal property, and this without reference to the nature of the property held by them, or the business in which they may be engaged. At the present day when a company is incorporated, it is usual to provide, by express enactment, that the stock of such company shall be deemed personalty. But the absence of such provision would not, it is apprehended, materially affect the question, for the weight of authority is decidedly in favor of the proposition that shares in corporations are to be held and treated as personal estate at common law. Hence, shares in the stock of an incorporated company are not, as a general rule, subject to dower.

26. But this question is not entirely free from difficulty. Cases are to be found in the reports which appear to conflict with the conclusion above expressed. A distinction has also been taken between the case of lands vested in a joint-stock company as a corporation, and not in the individual shareholders of such company, and of lands vested in the shareholders, with a grant of the mere power of *management* to the corporation. In the latter case the shares of the company have been held real estate.

27. The case of Drybutter *v.* Bartholomew,[1] decided in 1723, is one of the earliest cases bearing upon this question found in the reports. It involved the question as to the interest of the shareholders in the property of the New River Company, and whether that interest was personalty or realty. The company had its origin in the statutes of 3 James I., chapter 180, and 4 James I., chapter 12. The latter act enlarged, to some extent, the privileges created by the former. By virtue of these enactments, power was conferred on the mayor, commonalty, and citizens of London, to supply the city with water. By the first act the mere right to cut *alieno solo* was given; the property in the land was reserved to the owner.[2] The second act gave to the city liberty to erect a trunk or vault. These statutes created no stock, nor was any mention made in them of shares or shareholders. The city afterwards conveyed the right thus conferred upon them to Sir Hugh Middleton, who commenced the contemplated work, but died

[1] Drybutter *v.* Bartholomew, 2 P. Wms. 127.

[2] See New River Company *v.* Graves, 2 Vern. 431, where the act was so construed.

before it was completed. The right subsequently became vested in a variety of persons, and the new proprietors procured for themselves an act of incorporation, and although no provision was made for the creation of shares under the original charter to the city, yet it appears from the case of Drybutter *v.* Bartholomew above referred to, as well as Townsend *v.* Ash,[1] decided in 1745, that under the act of incorporation, shares in the company were actually created;[2] and in both these cases such shares were held to be real estate. The cases are very briefly reported, and it seems to have been assumed without controversy that the shares bore the character thus ascribed to them.

28. It appears, however, that the form of the New River Company's act of incorporation, and of its charter, and of the original conveyance to Sir Hugh Middleton, was applicable to real property only. The land was not vested in the corporation of London, but in the individuals.[3] The corporation was incidental to the purposes of management only, and was not seized of the land. This is assumed by the Lord Chancellor in Townsend *v.* Ash,[4] and he placed his decision in that case expressly upon the ground that the individual corporators had the property, and the corporation only the management of it.[5] These cases, therefore, though sometimes referred to as showing that stock in a water-works company is real estate, do not, when carefully considered, fairly support that position. They may be regarded as authority, to some extent, however, for the distinction noted in a preceding section,[6] with reference to the nature of the interest of the shareholders in the corporate property where it is vested in them individually, and not in the body corporate, as is usually the case.[7]

29. In Buckeridge *v.* Ingram,[8] decided in 1795, shares in the navigation of the River Avon, under the statute of 10 Anne, were held to be real estate, and subject to dower, and the authority of this

[1] Townsend *v.* Ash, 3 Atk. 336.

[2] See Wordsworth on Joint-Stock Comp. (39 Law Lib.) 288, 289; Johns *v.* Johns, 1 Ohio St. Rep. 350, 351.

[3] Per Lord Abinger in Bligh *v.* Brent, 2 You. & Coll. 288.

[4] 3 Atk. 337, 338; and see judgment of Alderson, B., in Bligh *v.* Brent, 2 You. & Coll. 295.

[5] Per Park, B., in Bligh *v.* Brent; Wordsw. on Joint-Stock Comp. (39 Law Lib.) 289.

[6] Sec. 26.

[7] Accord. Swayne *v.* Fawkener, Show. P. C. 207; see, also, Lord Sandys *v.* Sibthorpe, 2 Dick. 545; Lord Stafford *v.* Buckley, 2 Ves. Sr. 170, 182.

[8] Buckeridge *v.* Ingram, 2 Ves. Jr. 652.

case has since been recognized in several other cases.[1] By the statute of 10 Anne, the mayor, aldermen and common council of the City of Bath, their successors or assigns, or such persons as they should appoint, were authorized to improve the navigation of the River Avon, and to charge tolls on persons and property transported thereon. By an agreement executed between the corporate authorities of the one part, and the Duke of Beaufort and several other persons on the other part, the duke and his associates undertook to do the work in consideration of being allowed to take the tolls. By the eleventh article of the agreement, it was provided that "no survivorship shall at any time take place between the said parties and undertakers; but if any or either of them shall happen to die, the share or part of such so dying, shall descend and go to the heirs and assigns of the party or parties so dying." The master of the rolls held that the right to take the tolls was an incorporeal hereditament arising out of realty, and therefore "a tenement." He observed: "I have no difficulty in saying that wherever a perpetual inheritance is granted which arises out of lands, or is in any way connected with, or, as it is emphatically expressed by Lord Coke, exercisable within it, is that sort of property the law denominates real." One important feature in this case is sometimes overlooked. The company or association that succeeded to the rights and duties of the City of Bath, under the power of appointment contained in the original act, was not incorporated,[2] in which respect it differed from the New River Company, and the point decided really did not touch the question whether shares in the stock of a corporation are real or personal property. With regard to both these companies, it is remarked by Mr. Wordsworth, that the property given to them was real property, which they were to manage for the good of all. They had no power of converting it into any other description of property, but they were to keep it, and make profit of it as real estate. And further, the shares were transferable to the shareholders and their *heirs*.[3]

30. But the more recent English cases, while, perhaps, they do not disturb the authority of the older cases above noticed, in so far as they establish the doctrine that where lands are vested in the

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[1] Howse *v.* Chapman, 4 Ves. Jr. 542; Finch *v.* Squire, 10 Ves. Jr. 42; The King *v.* Bates, 8 Price, 357; The Earl of Portsmouth *v.* Bunn, 1 Barn. & Cress. 703.

[2] See Wordsw. on Joint-Stock Comp. (39 Law Lib.) 290. [3] Ibid.

shareholders and not in the body corporate, the shares are to be treated as real estate, nevertheless agree in declaring and maintaining a different result where the corporation is clothed with the legal title. One of the most important of these is Bligh *v.* Brent,[1] which involved the question whether shares in the Chelsea Water-works Company were realty or personalty. The act of incorporation left the question open, as it contained no declaration on the subject. The effect of the act was thus stated by Mr. Baron Alderson: "In the first place, there is a corporation to whose management the joint-stock of money subscribed by its individual corporators is entrusted. They have power of vesting it at their pleasure in real estate, or in personal estate, limited only as to amount, and altering from time to time the species of property which they may choose to hold; and in order to give them greater facilities and advantages, certain powers are entrusted to the undertakers by the legislature, and that even before they were constituted a body corporate, of laying down pipes, and thereby occupying land for the purposes of their undertaking. These powers render the use of joint-stock by the body corporate more profitable, but they form no part of the joint-stock itself; and one decided test is this, that they belong inalienably to the corporation, whereas all the joint-stock is capable expressly of being sold, exchanged, varied or disposed of, at the pleasure of the corporate body. It is of the greatest importance to look carefully at the nature of the property originally entrusted, and that of the body to whose management it is entrusted; the powers that body had over it, and the purposes for which these powers are given. The property is money; the subscriptions of individual corporators. In order to make that profitable, it is entrusted to a corporation, who have an unlimited power of converting part of it into land, part into goods, and of changing and disposing of each from time to time; and the purpose of all this is the obtaining a clear surplus profit from the use and disposal of this capital for the individual contributors. The shares of the 'Chelsea Water-works Company' are, therefore, personal estate." This question, with reference to the same company, had previously been decided the same way in Weekley *v.* Weekley;[2] and in Bradley *v.* Holdsworth,[3] determined in 1838, which involved the

[1] Bligh *v.* Brent, 2 You. & Coll. 268, 294.
[2] Weekley *v.* Weekley, 2 You. & Coll. 281.
[3] Bradley *v.* Holdsworth, 3 Meeson & Welsby, 422.

question whether shares in the "London and Birmingham Railway" might be sold by verbal contract, the ruling in Bligh *v.* Brent was referred to with approbation. Alderson, B., said: "All the cases were under review in Bligh *v.* Brent, where the question was as to shares in the Chelsea Water-works Company. That was a stronger case than the present, because there was no clause of this kind in the act of Parliament, and yet the shares were held personal property." The clause referred to expressly declared that the shares should to all intents and purposes be deemed personal estate, and transmissible as such, and should not be of the same nature of real property. But it is evident from what was said, that independently of this provision, the same decision would have been made. "I conceive," added Alderson, B., "that all the shareholders would take even without such a clause." And Park, B., said: "No doubt the company are seized of real property, as well as possessed of a great deal of personal property; but the interest of each individual shareholder is a share of the net produce of both when brought into one fund." So in Duncuft *v.* Albreçht,[1] it was held that a parol agreement for the sale of railway shares is valid, upon the ground that they are neither an interest in lands, nor goods, wares or merchandise, within the statute of frauds. In Watson *v.* Spratley[2] the same doctrine was applied to a contract for the sale of shares in a mining company managed on the cost-book principle. And to the same effect are the cases cited in the note.[3]

31. In the United States there is some diversity among the authorities upon this question. In the case of Welles *v.* Cowles,[4] decided by the Supreme Court of Connecticut, in 1818, it was held that shares of an incorporated turnpike company are real estate. "The right to the tolls," said the court, "is a right issuing out of real property, annexed to and exercisable within it; and comes within the description of an incorporeal hereditament of a real nature, on the same principle as a share in the New River, in canal navigation, and tolls of fairs and markets." It was claimed in the argument

[1] Duncuft *v.* Albrecht, 12 Sim. & Stu. 189.

[2] Watson *v.* Spratley, 28 Eng. Law and Eq. 507.

[3] Hargreaves *v.* Parsons, 13 Meeson & Welsby, 561; Humble *v.* Mitchell, 2 Railw. Cas. 70; S. C. 11 Ad. & Ellis, 205; Tempest *v.* Kilner, 3 C. B. 249; Knight *v.* Barber, 16 Meeson and Welsby, 66; see, also, Pickering *v.* Appleby, 1 Comyns' R. 354; Colt *v.* Nettervill, 2 Peer Wms. 304; Heseltine *v.* Siggers, 1 Exch. 856.

[4] Welles *v.* Cowles, 2 Conn. 567.

that the individual stockholders had only a claim on the company, and not upon the realty, and that this must be of a personal nature. In disposing of this view of the case, the court remarked: "But the stockholders, as members of the company, are owners of the turnpike road; and it is in virtue of this interest that they have their claims for the dividends, or their respective shares of the toll. It is not a mere claim on the corporation." This decision was recognized as law in 1822, in a suit between the same parties, though the question was not expressly made.[1]

32. In Binney's case,[2] decided in Maryland, the court said: "The whole estate of the Chesapeake and Ohio Canal Company, at least so far as it consists of the canal itself, and its necessary buildings, and the fixtures attached to them, must, according to the common law, be regarded as realty; and it was so considered by the original act of incorporation, but by a subsequent enactment it has been declared that it should be deemed personal property." In regard to the effect of this provision, the court added: "It appears that directing the estate of this corporation to be deemed personal property, can amount to no more than declaring it shall be governed by the municipal regulations of the country where it lies, in relation to personal property, instead of those in relation to real estate, but that it must, nevertheless, be governed by those laws, and none other, as being an immovable portion of the habitation of the nation." In Cape Sable Company's case[3] it was decided that the language of the act incorporating that company, declaring "that the lands, tenements, stock, property, and estate" of the company, "is and shall be held as real estate, and shall descend as such, agreeably to the acts of assembly in such cases made and provided," applied, at least so far as the personalty was concerned, only as among the stockholders themselves, and not as between them and third persons.

33. In Hurst *v.* Meason,[4] decided in 1835, the Supreme Court of Pennsylvania held that "a toll bridge erected by two individuals across a river between their lands, by legislative authority, is real estate." The court maintained that in such case there was "not only a right arising out of the soil, but, so far as the abutments of

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[1] Welles *v.* Cowles, 4 Conn. 182.

[2] Binney's case, 2 Bland's Ch. 99, 145, 146.

[3] Cape Sable Company's case, 3 Bland's Ch. 606, 670.

[4] Hurst *v.* Meason, 4 Watts, 346.

the bridge are concerned, it is the soil itself." It is to be remarked with respect to this case, however, that it does not appear that the builders of the bridge ever procured an act of incorporation. And the later cases of Gilpin *v.* Howell and Slaymaker *v.* Gettysburg,[1] seem to be against the doctrine of that decision.

34. In Price *v.* Price's Heirs,[2] the Court of Appeals of Kentucky, in 1838, held that stock in the Lexington and Ohio Railroad Company is real estate. Without referring to any adjudicated case, the court came to a conclusion which is thus expressed: "The right conferred on each stockholder is unquestionably an incorporeal hereditament. It is a right of perpetual duration; and though it springs out of the use of personalty, as well as lands and houses, this matters not. It is a franchise which has ever been classed in that class of real estate denominated an incorporeal hereditament."

35. Upon the other side we have decisions in Massachusetts, New York, Vermont, Ohio, Alabama, Tennessee, North Carolina, and Rhode Island.

36. The question came before the Supreme Court of Massachusetts as early as 1798, in the case of Russell *v.* Temple,[3] and it was held that shares in incorporated bridge and canal companies are personalty. The case was between the widow and heirs of Thomas Russell, the former contending that the shares were personal property, and that consequently she was entitled to a distributive portion of them, and the latter insisting that they were realty, and that therefore the widow had but a dower estate. "The principal reason of the decision," says Dane, "appears to be because the court considered that the individual member, or shareholder, had only a right of action for a sum of money, his part of the net profits or dividends. And so the law has been held to be since this decision was made." In support of this opinion we have the observations of Parsons, Ch. J., in Tippets *v.* Walker,[4] where, in speaking of a turnpike company, he uses the following language: "When the road is made, the corporation is entitled to demand and receive a toll of travelers for the use of it, in trust for the members of the corporation, in proportion to their respective shares. The property of every member is a right to receive a proportional part of the tolls, which is considered as

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[1] Gilpin *v.* Howell, 5 Barr, 57; Slaymaker *v.* Gettysburg, 10 Barr, 378.

[2] Price *v.* Price's Heirs, 6 Dana, 107.

[3] 3 Dane's Abr. 108, §§ 2–6.

[4] Tippets *v.* Walker, 4 Mass. 596.

personal estate." And in Howe *v.* Starkweather,[1] Parker, Ch. J., remarks: "Shares in a turnpike or other incorporated company are not chattels. They have more resemblance to choses in action, being merely evidence of property."[2] The same doctrine, substantially, is held in the cases cited in the note.[3]

37. In Ohio this subject has recently undergone a very thorough discussion. In the case of Johns *v.* Johns,[4] the question was directly presented whether shares in a railway company are personal or real estate. The proceeding was for dower in certain shares of railroad stock held by the husband of the demandant at the time of his decease. The authorities were carefully examined by the court, and the learned judge who delivered the opinion went very fully into the consideration of the question in all its bearings. The result was adverse to the claim of the widow, the court being unanimously of opinion that the shares were personal property. "A careful examination of the adjudications upon the subject," the court observed, "has brought us to the conclusion that, according to the weight of authority, the shares in question are personal property. In the early English cases the distinction, now well understood, between the property of a corporation and the rights of its members, does not seem to have been taken, and it appears to have been assumed that each shareholder had an *estate* in the corporate property, and that consequently, if that property was real, his share was also realty. But the cases we have cited abundantly show that the distinction above mentioned is now fully recognized in England, and that the property of a corporation may be mainly, if not wholly real, and yet the shares of its members be personalty." The court further remarked: "It must be admitted, however, that the definition of Lord Coke, cited with approbation in Buckeridge *v.* Ingram,[5] sustains the position that the franchise was a tenement savoring of the realty; for, in the language of Coke, it was 'exercisable within lands.' And,

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[1] Howe *v.* Starkweather, 17 Mass. 248.

[2] See, also, Tisdale *v.* Harris, 20 Pick. 9; Bank of Waltham *v.* Waltham, 10 Met. 334; Hutchins *v.* State Bank, 12 Met. 421.

[3] Wheelock *v.* Moulton, 15 Verm. 519; Isham *v.* Ben Iron Co. 19 Verm. 230; Denton *v.* Livingston, 9 John. 96; Arnold *v.* Ruggles, 1 R. Is. 165; McDougal *v.* Hepburn, 5 Flor. 568; Union Bank *v.* State, 9 Yerger, 490; Brightwell *v.* Mallory, 10 Yerger, 196; Planters' Bank *v.* Merchants' Bank, 4 Ala. 753; Heart *v.* State Bank, 2 Dev. Ch. 111.

[4] Johns *v.* Johns, 1 Ohio St. 350.

[5] See ante, § 29.

as before stated, we prefer to place our decision upon the distinction between the estate of the corporation and the individual rights of its members, rather than upon a distinction between the cases in which the profit arises wholly out of realty, and those in which it springs partly from realty, and partly from personalty, though this latter distinction seems to receive much support from both reason and authority."[1]

38. Mr. Parsons gives the following as the rule properly deducible from the authorities: "Generally, in this country, and in England, the stock of a corporation is personal property; and this is so, even though the whole property of the corporation be real, and the whole of its business relate to the care of real estate; if it be the surplus profit alone that is divisible among the individual members. But where lands are vested, not in the corporation, but in the individual shareholders, and the corporation has only the power of management, in that case the stock or shares are real property."[2]

39. Professor Greenleaf states the rule substantially to the same effect: "Shares in the property of a corporation are real or personal property, according to the nature, object and manner of the investment. Where the corporate powers are to be exercised solely in land, as where original authority is given by the charter to remove obstructions in a river and render it navigable, to open new channels, &c. to make a canal, erect water-works, and the like, as was the case of the New River water, the navigation of the River Avon and some others, and the property or interest in the land, though it be an incorporeal hereditament, is *vested inalienably in the corporators themselves*, the shares are deemed real estate. Such, in some of the United States, has been considered the nature of shares in toll-bridge, canal and turnpike corporations by the common law; though latterly it has been thought that railway shares were more properly to be regarded as personal estate. But where the property originally entrusted is money, to be made profitable to the contributors by applying it to certain purposes, in the course of which it may be invested in lands or in personal property, and changed at pleasure, the capital fund is vested in the corporation, and the shares in the stock are deemed personal property, and as such are in all respects treated. In modern practice, however, shares in corporate stock, of

[1] See, also, State *v.* Franklin Bank, 10 Ohio Rep. 91, 97; Walker's Intr. 211.

[2] 2 Parsons on Con. 315.

whatever nature, are usually declared by statute to be personal estate."[1]

Water granted for hydraulic purposes.

40. The case of Kingman *v.* Sparrow[2] presented the question whether dower is demandable in a right granted to take and use water for hydraulic purposes. In the year 1824–5, the State of New York, in the course of the construction of the Erie Canal, and as part of that work, erected in the bed of a portion of the Niagara River, what is known as the Black Rock dam. A harbor was also created at the same point. In January, 1827, the Canal Commissioners, in pursuance of authority conferred by law, "demised, leased, bargained, sold, and conveyed" to certain parties, "the right and privilege of taking and using, then and at all times thereafter, for hydraulic purposes, such and so much of the surplus waters of said canal at Black Rock, as can be taken under the sale," without interfering with the due and proper use of the canal and harbor. The lessees covenanted on their part to pay an annual rent for the right and privilege thus granted, a failure to make payment to operate as a forfeiture of their rights. In April, 1833, the Canal Commissioners, upon the application of the lessees, passed resolutions in reference to the location of buildings and machinery, so as to enable the lessees to use the surplus water, and under this authority, mills and a storehouse were erected on the dam, and upon piles in the harbor. The water power granted as above stated was employed in operating these mills. The husband of the demandant died vested with an undivided interest in this property and water power, and dower was claimed, not only in the mills and the premises upon which they were situate, but also in the right to the use of the water conferred by the State. Upon full consideration of the case, the court held that the right to take the water for hydraulic purposes was not subject to dower. "The Canal Commissioners," they remarked, "only sold, demised, &c. 'the right and privilege of taking and using at all times, for hydraulic purposes,' a portion of the *surplus waters* of the canal at Black Rock. This was a mere right and privilege to use surplus waters. There could be no dower in such a right. Nor did the per-

[1] 1 Greenl. Cruise, 89, § 8; accord. Redf. on Railw. 88, 89; Pierce on Railw. 127; 1 Hilliard on Real Prop. 73; see 3 Kent, 340, note, 5th edition.

[2] Kingman *v.* Sparrow, 12 Barb. 201.

mission which the Canal Commissioners gave, by the resolutions of 1833, to erect buildings in the river, and upon the dam, create any estate in the lessees of the privilege to use water, of which a widow of one of them could be endowed."[1]

Slaves.[2]

41. The statutes of Virginia,[3] Kentucky,[4] Arkansas,[5] and Missouri[6] confer upon the widow a right of dower in slaves. In Arkansas and Missouri the right is limited to such slaves as were possessed by the husband at the time of his death.[7] In Kentucky, under the early statutes, it was repeatedly decided that the husband might emancipate his slaves by will, and that in such case his widow had no right to be endowed thereof, although she renounced the will.[8] But a nuncupative will was deemed insufficient to pass slave property in that State, and, therefore, where the widow renounced the provisions of such a will, she was held dowable of her husband's slaves.[9] And now, by statute, the emancipation of slaves by will is not to affect

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[1] See, also, Buckingham *v.* Reeve, 19 Ohio, 399.

[2] "She shall be endowed of villeins regardant." 2 H. 6, 11, b. "So she shall be endowed of villeins in gross, for this is an inheritance." 2 H. 6, 11, b.; Vet. Nat. Br. 7, b. "And so of villein appendant, and the writ shall be *de libero tenemento*." Br. Dower, pl. 91. "She shall be endowed of a villein, either the third day's work, or every third week or month." Co. Litt. 32, a., 164, b., 307, a. "For in him a man may have an estate in fee, or fee tail, or for life, or years." 9 Vin. Ab. tit. Dower, 212, pl. 3, 4, and marg. note.

[3] Act of March 2d, 1819, 1 Rev. Code 1819, ch. 111, p. 435, § 60; p. 439, § 70; Page *v.* Page, 2 Rob. 424. The earliest statute in this country recognizing dower in slaves is the Virginia act of 1705, ch. 23, §§ 9–11; 3 Hen. Stat. at Large, 334–5.

[4] Rev. Stat. of Ky. by Stanton, vol. i. p. 425, § 14; vol. ii. p. 27, § 14; Rev. Stat. 1852, p. 282, § 14; p. 394, § 14; Smiley *v.* Smiley, 1 Dana, 94; McCans *v.* Board, Ibid. 340; Lee *v.* Lee, Ibid. 48; Brewer *v.* Van Arsdale, 6 Dana, 204; Triggs *v.* Daniel, 2 Bibb, 301; Graham *v.* Sam, 7 B. Mon. 408; Northcutt *v.* Whipp, 12 B. Mon. 65.

[5] Rev. Stat. (1838,) p. 339, § 20; Dig. of Stat. (1848,) p. 448, § 20; Dig. Stat. (1858,) p. 453, § 21; Cook *v.* Cook, 7 Eng. 381; Arnett *v.* Arnett, 14 Ark. (1 Barb.) 57; Welch *v.* Cole, Ibid. 400; Hill *v.* Mitchell, 5 Ark. 608; Morrill *v.* Menifee, Ibid. 629.

[6] Rev. Stat. Misso. (1845,) ch. 54, p. 430, § 2; Walls *v.* Coppedge, 15 Misso. 448.

[7] Rev. Stat. Ark. (1838,) p. 339, § 20; Dig. of Stat. (1858,) p. 453, § 21; Rev. Stat. Misso. (1845,) p. 430, § 2.

[8] Lee *v.* Lee, 1 Dana, 48; Brewer *v.* Van Arsdale, 6 Dana, 204; Graham *v.* Sam, 7 B. Mon. 408. See, also, Northcutt *v.* Whipp, 12 B. Mon. 65.

[9] McCans *v.* Board, 1 Dana, 340.

the right of dower therein where the widow elects to take under the law. In such case the widow is to be compensated to the extent of her interest in the slaves emancipated, from the other personal estate of the husband, if enough remain after payment of the debts. If part only of the slaves be set free, her share is to be taken from those not emancipated, if there be enough. If any part of those set free is necessary to make up her share, all the slaves emancipated are to be hired out, and the hire paid to her until she is compensated for her share.[1] The Virginia statute of 1819 contains a similar provision.[2]

42. In Arkansas the right of dower in slaves is held to embrace the increase accruing between the death of the husband and the time of the allotment of dower.[3] But, as above stated, the right does not attach until the death of the husband. And where the husband had disposed of slaves by gift during his lifetime; and where, also, slaves of the husband had been seized during his lifetime, on execution, and sold after his death, it was held that no claim of dower existed in either case. But the husband can not defeat his wife's dower in his slaves by emancipating them by will. If she renounce the will, her right to be endowed is unimpaired.[4]

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[1] Rev. Stat. Ky. (1852,) p. 282, § 14; 1 Stanton's Rev. p. 425, § 14.

[2] 1 Rev. Code 1819, p. 485, § 60.

[3] Menifee *v.* Menifee, 8 Eng. 9.

[4] Crow *v.* Powers, 19 Ark. 424.

CHAPTER XI.

OF THE NATURE AND QUALITIES OF THE ESTATE SUBJECT TO DOWER.

§ 1. Introductory.
2, 3. The estate must be one that the issue of the wife might inherit.
4. Not necessary that the wife should have issue.
5. It must confer a right to the immediate freehold.
6, 7. Incorporeal hereditaments governed by the same rule.
8, 9. The husband must be vested with the freehold and inheritance *simul et semel*.
§ 10. There must be no intervening freehold estate.
11, 12. Intervening chattel interest no impediment to dower.
13–15. Determination of the intermediate estate during the coverture gives dower.
16–34. Effect of intervening contingent freehold remainder.
35. The vesting of such remainder defeats dower.
36, 37. Effect of intervening possibility.

1. HAVING seen what property, with respect to its *nature* and *qualities*, is subject to dower, we come next to the consideration of the character of the *estate*, or degree of interest in such property, with which the husband must be invested, in order to enable the right of the wife to attach.

The estate must be one that the issue of the wife might inherit.

2. This doctrine relates more particularly to estates held in tail special. A case for its application is thus stated by Littleton: "If tenements be given to a man and the heirs which he shall beget of the body of his wife, although the husband die without issue, the same wife shall be endowed of the same tenements, because the issue which she, by possibility, might have had by the same husband, might have inherited the same tenements. But if the wife dieth, living her husband, and after, the husband takes *another* wife, and dieth, his *second* wife shall not be endowed in this case."[1]

[1] Litt. sec. 53; Bro. Dow. pl. 36; Finch's Law, b. 2, c. 8, pp. 125, 126; 2 Saund. Rep. 45, n. note 5; Perk. sec. 301, 302; Reeve's Dom. Rel. 40; see Spangler *v.* Stanler, 1 Md. Ch. Decis. 36.

8. It is to be observed, however, that under the law of entailments, cases may arise, where, although the issue of the wife might, by *possibility*, inherit the estate, yet no right of dower would attach in her favor. It is essential to her right that the issue should be able to take not only as heir to the father, but also in virtue of a seizin by him during the coverture upon which her claim to dower is founded; for although the issue might take as heir to the husband in respect of some *other* estate which he has in him in right, or in remainder, this alone would not confer dower.[1] The following case is presented by way of elucidation of this principle: "If a man be tenant in fee tail *general*, and make a feoffment in fee, and taketh back an estate to him and to his wife, *and to the heirs of their two bodies*, and they have issue, and the wife dieth, the husband taketh *another* wife and dieth, the wife shall not be endowed, for, during the coverture, he was seized of an estate tail *special*, and yet the issue which the second wife may have, by possibility may inherit."[2] Here, the only estate of which the husband had a seizin during the coverture of the second wife, was not inheritable by her issue, being an estate to him and the heirs of the body of himself and his first wife; and yet the issue of the second wife might, by possibility, inherit the *elder* estate tail, which was a tail general, and, in default of issue of the first wife, would actually succeed to that estate.[3] The same general doctrine is thus stated by Perkins: "If tenant in general tail take a wife, and enfeoff a stranger, and take back an estate to him and his wife in special tail, and the wife dies, and he takes another wife, and hath issue and dies, the second wife shall not be endowed; yet the issue is remitted to the general tail."[4]

In many of the States the rule of the common law, allowing estates to be entailed, is abolished. As to those States the distinctions above discussed are, practically, of but little importance.[5]

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[1] Park on Dow. 79.

[2] Co. Litt. 31, b.; Bro. Dow. pl. 18. [3] Park on Dow. 80.

[4] Perk. sec. 302. "If this was intended of the issue of the second wife, who are the only issue mentioned, and which the context seems to require, there could be no *remitter*, because the defeasible estate tail never descended on such issue, they not being inheritable to it. The real case, however, in the books, was, that the issue was by the first wife, which removes the difficulty." Park, 80, note.

[5] See post, ch. 13, §§ 3–6.

Not necessary that the wife should have issue.

4. It is not essential to the attachment of dower that the wife should actually have issue by her husband: the possibility of issue is sufficient. She must, according to the common law, be of such an age at the death of her husband as to have had a *possibility* of conceiving, or bearing children, and this age the law contemplates to be nine years.[1] But the law does not set any bounds to the possibility of having issue at the most advanced age; and it has been decided that if a man marry a woman one hundred years old, she shall have her dower, though by possibility of nature she can not have issue.[2] The reason for this rule assigned by Lord Coke is as follows: "Seeing that women in ancient times have had children at that age whereunto no woman doth now attain, the law can not judge that to be impossible which by nature was possible; and in my time a woman above threescore years old hath had a child, and *ideo non definitur in jure.*"[3]

It is believed not to be essential to the right of dower in any case that the wife should be physically capable of bearing children. Dower is a right incident to marriage, and at this day the possibility of having issue can hardly be regarded as a prerequisite to the inception of the estate. If, by the law of the place where the marriage is contracted, the wife is competent to enter into that contract, and the marriage be valid in other respects, the necessary effect would seem to be to clothe her with *all* the rights pertaining to the marital relation. And if the marriage remain undissolved during the life of the husband, it seems clear that the widow would be entitled to dower, even though it were rendered absolutely certain that by reason of physical malformation, or other cause, she was utterly incapable of bearing children.[4]

The estate of the husband must confer a right to the immediate freehold.

5. This is an essential requisite at the common law. Dower is not allowed in estates in remainder or reversion expectant upon an

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[1] Vide supra, ch. 8, §§ 11–17; Park, Dow. 81.

[2] 2 Danv. 652; Bro. Dow. pl. 86; Co. Litt. 40, a.; Roll. Abr. 657.

[3] Co. Litt. 40, a.; 2 Bl. Com. 131; Tud. Cas. 45.

[4] Supra, ch. 7, §§ 1, 2; ch. 8, § 19; and see 1 Washb. on Real Prop. 153.

estate of freehold, and hence if the estate of the husband be subject to an outstanding freehold estate which remains undetermined during the coverture, no right of dower attaches.[1] But, in order to exclude dower, the preceding estate must be a *freehold* interest. An estate for years, or other mere chattel interest, furnishes no impediment to a title of dower.[2] This distinction is placed upon the ground that such an interest does not interfere with the seizin of the immediate freehold, but rather protects and preserves that seizin, the possession of the party having the chattel interest being regarded as the possession of the owner of the freehold.[3] Interests of this character may postpone the enjoyment of dower, but they do not prevent the estate from attaching. Thus, where a testator directed that if his personal estate should be insufficient for the payment of his debts and certain legacies given by his will, his executors should pay the same out of the rents and profits of his real estate; and subject to the payment of such debts and legacies, he devised his real estate in tail to his son, who married and died before the debts were paid, and before taking possession, it was held that the executors had but a chattel interest in the estate, and that the widow of the son was entitled to dower.[4] It is said, however, that in a case of this description, the endowment can not take place until all the debts have been satisfied.[5] Upon the principle above stated, it is supposed that if the husband's seizin of the inheritance be subject to a statute staple,

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[1] Co. Litt. 82, a; Perk. sec. 339, 340; Park, Dow. 38, 49, 53, 54; 1 Roper on Husb. and Wife, by Jacob, 359; 1 Greenl. Cruise, 162, § 8; 4 Kent, 38–40; Stearns' Real Act. 285; 1 Washb. Real Prop. 154, §§ 5, 6; Blood *v.* Blood, 23 Pick. 80; Otis *v.* Parshley, 10 N. H. 403; Dunham *v.* Osborn, 1 Paige, 634; Eldredge *v.* Forrestal, 7 Mass. 253; Fisk *v.* Eastman, 5 N. H. 240; Moore *v.* Esty, Ibid. 479; Arnold *v.* Arnold, 8 B. Mon. 202; Apple *v.* Apple, 1 Head, (Tenn.) R. 348; Blow *v.* Maynard, 2 Leigh, 30. But in Kentucky this principle does not extend to a remainder in slaves; Northcutt *v.* Whipp, 12 B. Mon. 65. The reader is referred to chapter 15, where the subject of dower in reversionary estates, and estates subject to a prior claim for dower, is treated at length.

[2] Park, Dow. 58, 77, 78; 1 Roper, H. and W. by Jacob, 361; 1 Roll. Abr. 670, pl. 7; Bro. Dow. pl. 89; Co. Litt. 32, a., 296, a.; Bates *v.* Bates, 1 Lutw. 729; S. C. 1 Ld. Raym. 326; 1 Greenl. Cruise, 162, § 8; 1 Washb. Real Prop. 154, § 8; 4 Kent, 39; Weir *v.* Humphreys, 4 Ired. Eq. R. 278.

[3] 1 Roper, H. and W. by Jacob, 361; Park, Dow. 77; Co. Litt. 32, a.

[4] Hitchen *v.* Hitchen, 2 Vern. 408; S. C. Prec. in Ch. 133; 2 Freem. 311; Cordell's case, stated in Manning's case, 8 Co. 96, a.; Co. Litt. 42, a.; Perk. sec. 335; 2 Crabb's Real Prop. 150; Tud. Cas. 43; Weir *v.* Humphreys, 4 Ired. Eq. R. 278.

[5] 1 Roper, Husb. and Wife, by Jacob, 373; 1 Greenl. Cruise, 157, § 23; 2 Crabb's Real Prop. 150, 151; Hitchen *v.* Hitchen, 2 Vern. 403.

statute merchant, or an elegit, the wife's dower will attach, as those estates are but chattel interests.[1]

Incorporeal hereditaments governed by the same rule.

6. The same general doctrine is applicable to incorporeal hereditaments. If the freehold be *suspended* during all the time of the coverture, no right of dower attaches. This is illustrated by a case put with respect to the husband's curtesy in a seigniory, the same principle applying to dower: "If a tenant make a lease for *life*, of the tenancy to the seignioress, who taketh a husband, and hath issue, the wife dieth, he shall not be tenant by the curtesy; but if the lease had been made but for years, he shall be tenant by the curtesy."[2]

7. If the suspension do not take place previous to the marriage, but is the result of the marriage itself, the right of dower is not impaired. The following quotation from Perkins supports this proposition: "If there be lord, and a woman tenant of one acre of land by fealty, and twelve pence rent, and they intermarry, and the husband die, the wife shall be endowed of the third part of the rent by way of *retainer;* and yet the husband was not seized thereof in deed during the marriage, for by the marriage the seigniory was in suspense, and so continued during the marriage. But notwithstanding, the husband was tenant of it during the marriage as to using an action, so that it was tantamount to a possession in law."[3]

So if the suspension be for years only, it does not prevent dower from attaching.[4]

The husband must be vested with the freehold and inheritance simul et semel.

8. In order to render the wife dowable, the freehold and inheritance are required to be in the husband *simul et semel*—"at once and together."[5] They must also meet in him as one integral estate, and not as several or successive estates. But it is not necessary that

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[1] 1 Roper, H. and W. 373.

[2] Co. Litt. 29, b.

[3] Perk. by Greening, sec. 303; Park, Dow. 55.

[4] Co. Litt. 29, b.; Park, Dow. 77.

[5] Perk. sec. 333; Park, Dow. 56; 1 Roper, H. and W. by Jacob, 370, 371; 4 Kent, 39.

they should result from one entire limitation, nor that there should be a unity of title as to the freehold and inheritance. By whatever means they meet so as to become absolutely consolidated, the creation of a right of dower is the result.[1] If an estate, in terms, be limited to the husband for life, with remainder to his heirs or to the heirs of his body, it is sufficient, if in point of construction, the remainder thus limited, will operate to vest the inheritance in *possession* in the husband.[2] And if the husband be seized of a life estate in lands and acquire the immediate reversion or remainder in fee expectant upon its determination, the two estates, by force of the doctrine of merger, will become consolidated, and unite in him as one entire estate of inheritance. The same principle applies where the husband is seized of the remainder or reversion, subject to a freehold estate, and that estate is surrendered to him during the coverture. In either case, the wife, if she be the survivor, is entitled to dower.[3]

9. In a case determined in Maine the consideration for a tract of land was paid by the husband, but the conveyance was made to a third person for the purpose of defrauding the creditors of the former. Subsequently the grantee executed to the husband a life lease of the premises, and the latter entered and continued in possession until his death. It was held that his widow was not entitled to dower. The decision, however, was placed more especially on the ground that the husband was not vested with a *legal* estate in the inheritance, following, in this particular, the rule of the common law excluding dower from the estate of a *cestui que trust*. And the court suggested that if dower be not allowed where the trust is lawful, *a fortiori*, the wife would not be dowable where the trust is fraudulent in its character, and therefore not enforceable in a court of equity so as to invest the husband with the necessary seizin.[4]

There must be no intervening vested freehold estate.

10. The interposition of a vested freehold estate in a third person, between the freehold and inheritance of the husband, will, during the continuance of that estate, prevent dower from attaching. It is not

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[1] Park, Dow. 56. [2] Ibid.; Perk. sec. 335.

[3] Post, §§ 13–15; Perk. sec. 337; Tud. Cas. 43; 1 Washb. R. P. 154, 155; Beardslee *v.* Beardslee, 5 Barb. 332.

[4] Mann *v.* Edson, 39 Maine, 25.

enough that the husband is seized of an estate of freehold in possession, and an estate of inheritance in remainder or reversion. The inheritance, as well as the freehold, must be in possession. In other words, it must be the immediate inheritance, and not an inheritance expectant upon an estate of freehold in any other person, interposed between the freehold and inheritance of the husband. Therefore, if lands be limited to A. for life, remainder to B. for life, remainder to A. in fee, the wife of A. will not be entitled to dower, unless, by the determination of the estate of B. during the coverture, A. becomes seized of the inheritance in possession. The intervening estate of B. prevents the operation of the law of merger, and keeps the freehold and inheritance of A. separate and distinct. As a consequence the right of dower does not attach.[1]

Intervening chattel interest no impediment to dower.

11. An estate for years or other chattel interest intervening between the freehold and inheritance of the husband will not prevent a title of dower from attaching.[2] This proposition is thus tersely stated by Perkins: "If a lease of land be made to the husband for life, the remainder to a stranger for years, the remainder to the husband in fee, and the husband die during the years, the wife may recover dower; but execution shall stay until the term be determined, for this mesne remainder for years shall be no impediment, since the freehold and the fee were sufficiently joined in the husband *simul et semel* for the wife to have dower."[3] The rule is the same if the first estate be *pur auter vie* only, and limited to the husband and his assigns.[4]

12. In all cases of the character above considered, dower attaches,

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[1] Finch's Law, b. 2, c. 8, p. 125; Bro. Dow. pl. 6; 1 Roll. Abr. Dow. pl. 9; Perk. sec. 333, 335, 338; Park, Dow. 57; Bates' case, 1 Salk. 254; S. C. 1 Ld. Raym. 326; 1 Roper, H. and W. by Jacob, 371; Eldredge *v.* Forrestal, 7 Mass. R. 253; Dunham *v.* Osborn, 1 Paige, 634; Fisk *v.* Eastman, 5 N. H. Rep. 240; Moore *v.* Esty, Ibid. 479; Green *v.* Putnam, 1 Barb. S. C. 500; Northcutt *v.* Whipp, 12 B. Mon. 65.

[2] Perk. sec. 336; Co. Litt. 32, a., 296, a.; Bates *v.* Bates, 1 Ld. Raym. 326; S. C. 1 Salk. 254; 1 Lutw. 729; Weir *v.* Humphries, 4 Ired. Eq. R. 278; Park, Dow. 77; 2 Crabb, Real Prop. 133, 158; 4 Kent, 39.

[3] Perk. sec. 336.

[4] Trevelyan *v.* Trevelyan, decided in the Eng. C. P. Trin. T. 1826. See note of the case in Addenda to Perkins, by Greening, p. 169; see, also, note to sec. 336.

subject only to the term, or other intervening chattel interest. The enjoyment of the estate by the dowress is postponed until such intervening interest is determined. If rent be reserved to the husband upon the intervening estate, the widow is entitled, upon endowment, to a proportionate part of such rent.[1]

Determination of the intermediate freehold during coverture subjects the estate to dower.

13. In all cases in which dower is prevented from attaching by reason of the existence of an intermediate estate, the impediment will, of course, be removed by the determination of that estate.[2] A surrender of the intervening life estate by the tenant, or any grant thereof operating virtually as a surrender, although not so in form, will be attended with this result. Thus, a lease to the reversioner or remainder-man and his heirs for the life of the lessor therein, is in substance a surrender, for the reason that thereby the tenant for life parts with all his estate.[3] But a lease for the life of the *remainder-man* or *reversioner* will not operate as a surrender. In such case there is no merger of the particular estate. The reason assigned for this distinction is, that when a tenant for his *own* life makes a lease to another for the life of the *lessee*, the tenant for life retains a reversion, or what is sometimes denominated in the old books, a possibility, as possibly he may survive the lessee; and upon the happening of that event he would be entitled to enjoy the premises for the unexpired term of his own life. When such a lease is made to the owner of the inheritance, this reversionary interest of the tenant becomes an interposed estate of freehold between the lease for life and the inheritance.[4]

14. An instance is given in the books where a surrender will confer a title of dower although the surrender be defeasible upon the happening of a certain contingency. As where husband and wife are tenants for life and surrender to the reversioner, the wife of the latter is held dowable. And yet, if the wife of the tenant survive her husband, she may defeat the surrender. Here there is no inter-

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[1] Post, ch. 18. [2] Co. Litt. 29, a.; Park, Dow. 74; Bro. Dow. pl. 17.

[3] 18 E. 3, 45; Park, Dow. 75.

[4] Co. Litt. 42, a.; 2 Roll. Abr. 496, pl. 7; Bro. Dow. pl. 17; Bro. Estate, pl. 67; Park, Dow. 58, 75. The fact that the remainder-man is a party to the lease, prevents the forfeiture which might otherwise attach upon the act of the tenant for life.

posed estate, but merely a right of defeating the surrender upon the happening of a certain event.[1] The exercise of this right would of course terminate the dower estate created by the surrender.[2]

So, also, if the tenant for life surrender to the reversioner upon condition the wife of the reversioner will be dowable so long as no entry is made for condition broken.[3]

15. It is to be noted in this connection that, in order to confer a right of dower in this class of cases, it is necessary that the intervening estate should terminate in the lifetime of the husband. If the wife survive the husband, and after his death the intermediate estate should determine by a surrender to his heirs, or otherwise, she would not thereby acquire a right to dower, for, as will be explained in the next chapter,[4] seizin *during the coverture* is indispensable to the inception of that estate.[5]

Effect of intervening contingent freehold remainder.

16. Questions of the most abstruse and perplexing character have occasionally arisen with regard to the effect upon the right of dower, of the interposition of a *contingent* estate of freehold, between a limitation to the husband for life, and a subsequent remainder to his heirs. And to some extent, these questions have been rendered still more embarrassing, by the rule of the common law making contingent remainders liable to destruction by the determination of the particular estates upon which they depend before such contingent estates become vested, and the exceptions and qualifications engrafted upon this rule.

17. The rule above referred to has long held a prominent place in the English Law of Real Property. The general doctrine is that the determination or extinguishment of the particular estate upon which the contingent remainder rests for its support, before the event has happened which is to enable it to vest, operates to its total annihilation.[6] This general doctrine is thus stated by Lord Hale: "If the contingent remainder can not take effect immediately on the first determination of the particular estate, whether it be determined by

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[1] Park, Dow. 75.

[2] See ch. 14, §§ 3–5.

[3] Bro. Dow. pl. 74; Park, Dow. 75.

[4] Chap. 12.

[5] Perk. sec. 335; Park, Dow. 76.

[6] Fearne, Cont. Rem. 316; 2 Greenl. Cruise, 269; 4 Kent, 258; Archer's case, 1 Co. 64.

merger or surrender, or in any other way whatsoever, it will never vest afterwards, though the particular estate should come *in esse* again."[1] But to the general rule thus laid down the same learned judge has annexed the following qualification: "Where an estate *in esse* and a contingent remainder over to him who had the first estate *in esse* are united together by *one and the same* conveyance, there the remainder *in esse* is vested until the contingent remainder comes *in esse*, and then the estates shall be opened and disjoined by the letting in of the contingent remainder, because they were all created together by the same conveyance, and therefore the estates shall be opened and closed as appointed by the original conveyance; but otherwise it is when the remainder *in esse* comes to the particular estate by any *grant or conveyance* made *after* the original conveyance, for there the contingent remainder will be destroyed."[2]

18. It is another principle of the common law, having a direct and important connection with this subject, that whenever the present freehold and ultimate inheritance become united in the same person, and there is no intervening *vested* estate, the freehold becomes instantaneously lost or merged in the inheritance; or, as Blackstone expresses it, "Whenever a greater estate and a less coincide and meet in the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be merged; that is, sunk or drowned in the greater."[3] A contingent remainder, while contingent, is not recognized in law as an *estate*, in the proper sense of that term;[4] and, therefore, in the case above supposed, an intervening remainder resting in contingency, will, by the application of the principle above stated, be absolutely defeated by such merger of the particular estate. This proposition, however, is subject to the qualification noticed in the preceding section relating to the creation of the several estates by the same instrument.[5]

19. The following examples are given by way of elucidation and illustration of these principles: Suppose that A., who has no son, has lands given him for his own life, remainder in fee to his eldest son, and the reversion to B. and his heirs. In this case A. would have a vested estate for his own life in possession. There would be

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[1] Purefoy *v.* Rogers, 2 Saund. 380, 387.
[2] Ibid.
[3] 2 Bl. Com. 177.
[4] Wms. Real Prop. 235.
[5] See, also, infra, § 22, for the rule where the inheritance comes to the tenant for life by descent from the donor or testator.

a contingent remainder in fee to his eldest son, which would become a vested estate in such son the moment he was born. But suppose that A., before the birth of a son, purchase from B. his remainder in fee, and obtain a conveyance of it to himself. In such case A. would have an estate for his own life by the original grant or devise, and also, by his purchase, an immediate vested estate in fee simple in remainder, expectant on his own decease. And there being no intervening *vested* estate, the life estate would merge in the remainder in fee, and thus destroy the contingent remainder.[1] The same result would follow a surrender by A. of his life estate to B. before the birth of a son, the effect of which would be to give to B. an uninterrupted estate in fee simple in possession, and the consequent destruction of the contingent remainder.[2] So if A. and B. should unite in a conveyance of their several estates to C., before the birth of a son to A., the consequence would be the same—C., by acquiring and uniting in himself the only existing vested estates, would have obtained an estate in fee simple in possession, on which no contingent remainder could depend.[3]

20. It will readily be seen that, in the cases above supposed, the intervening contingent interest interposes no obstacle to the attachment of dower. The merger, where it occurs, results in clothing the person in whom the two estates meet with the entire indefeasible estate. And it is immaterial in what manner the merger is produced. Whatever act is sufficient in law to determine the particular estate, will have the effect of destroying the contingent remainder. The instances in which this general rule is qualified will be more particularly stated hereafter.[4]

21. It may be here observed, that in England the common law rule permitting contingent remainders to be defeated by the destruction of the precedent particular estates, has been changed by statute.[5] And, in this country, similar statutes are in force in several of the States. Thus, it is expressly enacted in Mississippi, that an alienation by the tenant of the particular estate, or its union by purchase or descent, shall not operate to defeat, impair, nor in any

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[1] Fearne, Cont. Rem. 317, 340; Wms. Real Prop. 235.

[2] Fearne, Cont. Rem. 317, 318; 2 Greenl. Cruise, 270, § 6; Wms. Real Prop. 235; and see Thompson v. Leach, 2 Vent. 198; S. C. 2 Salk. 427.

[3] Fearne, Cont. Rem. 322, note; Wms. Real Prop. 235, 236; 4 Kent, 254; Noel v. Bewley, 3 Sim. 103; 5 Cond. Eng. Ch. 33.

[4] Post, § 22.

[5] 8 & 9 Vict. ch. 106, § 8.

wise affect the remainder.[1] The Revised Statutes of Indiana of 1843 contain an enactment which, in general terms, declares that no determination of the particular estate before the happening of the contingency shall defeat a remainder otherwise valid.[2] A like statute is in force in Michigan.[3] Except as to estates tail the law is the same in Maine.[4] So, also, in Massachusetts[5] and New York.[6] The effect of enactments of this character appears to be to place the cases to which they apply substantially upon the same ground occupied by those which we shall now proceed to consider.

22. The principal difficulty with regard to the right of dower, in cases where contingent remainders intervene, occurs where the several estates are limited by the same instrument, or where the person having the particular estate by devise, is also heir at law to the testator, and takes the fee by descent *immediately* from such testator.[7] In either of these events, if there be an intervening contingent remainder, there will be no merger of the freehold and inheritance. The law will not permit the intention of the donor or testator to be defeated by the application of the technical doctrine of merger, where the person having the freehold and fee takes them by virtue of the same instrument which creates the contingent remainder, or where the fee descends to him directly from the testator by whose bounty he holds the freehold. In these cases, therefore, the contingent remainder is not defeated by reason of the particular estate and the fee becoming united in the same person.[8]

23. This being the rule, the question as to the right of dower in such cases is attended with peculiar difficulty. It is, as we have already seen, a fundamental principle in the law of dower, that the

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[1] Rev. Stat. 1840, How. & Hut. Dig. p. 348, § 25; Rev. Code Missis. p. 307, § 2, art. 7.

[2] Page 425, ch. 28, §§ 63, 65.

[3] Comp. Laws Mich. 1857, vol. ii. pp. 821, 822, §§ 32, 33, 34.

[4] Rev. Stat. 1840, ch. 91, §§ 10, 11; Rev. Stat. 1857, ch. 73, § 5.

[5] Rev. Stat. ch. 59, §§ 7, 8; Gen. Stat. Mass. ch. 89, §§ 10, 11.

[6] 2 Rev. Stat. p. 11, §§ 82, 33; 2 Greenl. Cruise, 270, note; and see 4 Kent, 252; 1 Washb. Real Prop. 156, note.

[7] For the rule where the descent is *mediate*, and not *immediate*, see post, § 25.

[8] Wiscot's case, 2 Co. 60, b.; Purefoy *v.* Rogers, 2 Saund. 380, 387; Plunkett *v.* Holmes, 1 Lev. 11; Raym. 28; Archer's case, 1 Rep. 64; Boothby *v.* Vernon, 9 Mod. 147; Crump *v.* Norwood, 7 Taunt. 362; Fearne, Cont. Rem. 341, 503; Gilb. Uses, by Sugden, 303, note (2); 1 Roper, Husb. and Wife, by Jacob, 9, 363, 364; 2 Greenl. Cruise, 273, 274; 4 Kent, 254; see Doe *v.* Scudamore, 2 Bos. & Pul. 297.

husband must have the immediate freehold and inheritance, *simul et semel.* If, therefore, the intermediate contingent interest operate to prevent the life estate of the husband from merging in the inheritance, and thus keeps the two estates disjoined, it is difficult to understand how, upon principle, the right of dower can attach so long as there is a continuing possibility that the contingent estate may vest.[1] It would seem, however, to be the result of the adjudged cases, and the concurring opinion of many of the writers on the law of real property, that where a contingent estate of freehold is interposed between a limitation to the husband for life and a subsequent remainder to his heirs, the remainder is executed in possession in the tenant for life *sub modo;* or, in other words, that the estates are consolidated or united *until* the happening of the contingency; but with the qualification annexed to such consolidation, that if the contingency happen, they shall again divide, and resume the character of several or distinct estates, so as to let in the estate limited upon that contingency.[2] And it appears to be the prevailing opinion that upon this union of the freehold and inheritance *sub modo,* a right of dower attaches, subject to a liability to be divested upon the hap-

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[1] Park, Dow. 63, 64; Ibid. 71–73; 4 Kent, 40, note.

[2] Purefoy *v.* Rogers, 2 Saund. 380, 387; Lewis Bowles' case, 11 Co. 79, a., 80, a.; Co. Litt. 28, a.; Fearne, Con. Rem. 36; Preston, Rule in Shelley's case, 80; 3 Prest. Conv. 113, 489; 1 Roper, H. and W. 9, 362–365; 2 Greenl. Cruise, 272, 273, §§ 19, 20; and see Park, Dow. 61, 62. Mr. Park considers it an open question whether dower attaches in such cases, and appears to incline strongly to the opinion that it does not. Park, Dow. 70–73. Mr. Washburn holds explicitly that there is no dower. 1 Washb. Real Prop. pp. 155, 156, § 7. In this he is supported by the views of Mr. Hilliard. 1 Hilliard's R. P. 2d ed. p. 184, § 49. In the latter work, but two reported cases are cited to this point—Moore *v.* Esty, 5 N. H. 492, and Duncomb *v.* Duncomb, 3 Levinz, 487. In the first of these the intervening estate was held a vested one; and the decision in the second case is supposed to have been placed on the same ground. Post, § 37. It may be remarked, further, that the case which Mr. Hilliard puts, by way of illustration, of an estate limited to A. and B. for their lives, and after their deaths to the heirs of B., is hardly in point. The wife of B. is held not dowable in such case on account of the *joint* nature of the life estate in A. and B., rather than by reason of the contingency as to the survivorship. See post, § 32; also, ch. 12, § 38; and ch. 16, § 4. And if the two estates (*i.e.* the life estate and the inheritance) be derived from different sources or titles, so as to enable the doctrine of merger to apply, the life estate of B. would become merged, as to a moiety, in the inheritance, and the joint tenancy severed. The effect of this would be to give dower to his wife, in a moiety, at least, of the lands. See post, § 32, and the authorities there cited.

pening of the contingency and the consequent vesting of the contingent estate.[1]

24. In one portion of his treatise on the Law of Merger, Mr. Preston speaks of this consolidation as a "temporary merger."[2] In another passage it is referred to by him as a protection *from* merger.[3] Mr. Park is of opinion that it is unaccompanied by merger. "The effect of a merger," he observes, "would be to accelerate the remainder limited to the heirs of the body, and by annihilating the particular estate of freehold by which the contingent remainder is supported, it would, *ipso facto*, destroy that contingent remainder. The consolidation which the books suppose, would, therefore, appear to be an exception to the law of merger; an union of the time of two estates, without an involving of the ownership of the prior estate in that of the subsequent one."[4]

25. Where the several estates are not created by the same instrument, or where the descent of the fee upon the tenant for life is not immediate, but *mediate*, from the testator; as where it first descends to another person as heir, and from him to the tenant for life; or where it devolves from a devisee in remainder under the will, the doctrine of merger applies, and the contingent remainder will be destroyed.[5] This proposition is here stated as the rule of the common law, without reference to the modifications effected by the several statutory provisions before referred to.[6] Where a merger occurs in the manner above stated, the right of dower will unquestionably attach.

26. The old reports contain several decisions bearing upon the questions discussed in the foregoing pages. Cordal's case is one of these.[7] In that case lands were devised "to Ed. Cordal, (brother of the testator,) for life; remainder to his first son in tail, and so to the

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[1] Watk. Conv. by Preston, 45; Prest. Est. 535, (42 Law Lib.); Com. Dig. Est. (B. 18); 1 Roper, H. and W. 9, 363; 2 Crabb, Real. Prop. 160; Tud. Cas. 43; and see 3 Prest. Conv. 113.

[2] 3 Prest. Conv. 113. Chancellor Kent terms it "a kind of temporary merger;" 4 Kent, 40, note.

[3] 3 Prest. Conv. 489. [4] Park, Dow. 62, 63.

[5] Fearne, Cont. Rem. 343, 344, 4 Am. ed.; 1 Roper, Husb. and Wife, 363–365; 2 Greenl. Cruise, 274, §§ 26, 27; 4 Kent, 254; Kent *v.* Harpool, 1 Vent. 306; T. Jones, 76; Purefoy *v.* Rogers, 2 Saund. 386, 387; Hooker *v.* Hooker, Rep. temp. Hardwicke, 18; Crump *v.* Norwood, 7 Taunt. R. 362.

[6] Supra, § 21.

[7] Cordal's case, Cro. Eliz. 316; S. C. stated 8 Co. 96.

second; the remainder to the heirs of the body of Ed. Cordal." According to the report of the case, "it was resolved, that the estate tail was not executed (in possession) for the possibility of the mean estate that might interpose, and therefore it was always disjoined during the life of Ed. Cordal; so that of that estate his wife could not be endowed. And this was resolved upon conference." It has been remarked, that it is difficult to understand with precision what the judges intended to express by the foregoing resolution. Taken in its literal extent, it can not be sustained at this day, for it is now generally conceded that under such a limitation, for some purposes the estate tail is executed, and there is a union of the freehold and the inheritance. In accordance with this view, Cordal's case has, on several occasions, been denied to be law.[1]

27. Another early case involving this question, is Boothby *v.* Vernon, which was a proceeding for curtesy.[2] Anne Boothby was tenant for her life, with contingent remainder to the issue male of her body *living at her death*, in tail male, and she had the reversion in fee *by descent*. The Court of Common Pleas, on a case sent there by the Court of Chancery, certified that the husband of Anne Boothby was not tenant by the curtesy. Upon a rehearing before Lords Commissioners Raymond and Gilbert, it was argued that the husband had a right to be tenant by the curtesy, because his wife was seized of the inheritance; for, though she had an express estate for life given her by the will, yet there was no immediate remainder which could possibly vest during her life; but the inheritance was limited upon a contingency at her death, and, therefore, she being heir at law to the testator, it must descend to her till the contingency happen, so that she was seized of the inheritance subject to the contingency. The case was also argued upon another ground, but the court appear to have decided it without reference to the circumstance that the wife had the reversion by descent, arguing only upon the intention of the testator, that she took no estate of inheritance under the will; a point which was not made at the bar. Towards the conclusion of the judgment, however, the court is reported to have put the case, that "where an estate for life is limited to a woman, remainder to her first, and every other son in tail male,

[1] Park, Dow. 64; see 2 Saund. 386; Cas. temp. Hardw. 18; 2 Barnard. K. B. 379; Co. Litt. 239, b. note 8; Fearne, Cont. Rem. 346, 4 Amer. ed.; Gilb. Dev. 71.

[2] Boothby *v.* Vernon, 9 Mod. 147; S. C. 2 Eq. Ab. 727.

remainder to the heirs of her body, remainder to her right heirs, here it is plain that she is seized of the inheritance; yet *if she hath a son*, her husband shall not be tenant by the curtesy, because the contingent estate which is to arise upon her death, intervenes between her estate for life, and the inheritance."[1]

28. This case is sharply criticised by Mr. Park. "The decision of Boothby *v.* Vernon," he observes, "is peculiarly unsatisfactory. The reasoning of the judges as to the intention of the testator, quite overlooks the question; such intention having nothing to do with the positive rule of law which cast the reversion upon Anne Boothby as the heir at law of the testator, and the reference made to the case of a limitation similar in terms to that in Cordal's case, is expressly qualified by saying, '*if she had a son;*' in which event, no doubt could be entertained that the title of the husband to be tenant by the curtesy would be avoided. Indeed, this case of Boothby *v.* Vernon can not be admitted as a direct authority either way, the judges having evidently treated the wife as being a bare tenant for life, with a possibility to her issue, as was observed by Lord Hardwicke in Hooker *v.* Hooker."[2]

29. In the case of Hooker *v.* Hooker,[3] above referred to, lands were settled to the use of William Hooker, the elder, for his life, remainder to his wife for life, remainder to William Hooker (his son and heir apparent) for life, remainder to his first and other sons in tail, remainder to his daughters in tail, remainder to William Hooker, the elder, in fee. William Hooker, the father, and his wife died in the lifetime of the son, who also died *without issue*, and the question was whether his widow was entitled to dower. The case was twice argued during the time of Lord Chief Justice Raymond, and on each of these arguments the court were strongly of opinion that the widow had a title of dower.[4] They agreed, that "where the estate for life, and the remainder in fee, are in one and the same person by the same conveyance, there shall be an opening of those estates, in order that the contingent remainder may vest. But wherever the remainder in fee comes to the person who has the estate for life, and there is no vested remainder between, in such case the contingent remain-

[1] Park, Dow. 64, 65. The words "which is to arise upon her death," appear to have crept in by mistake. Ibid. note.

[2] Park, Dow. 65, 66.

[3] Hooker *v.* Hooker, Cas. temp. Hardw. 18; 2 Barnardiston, K. B. 200, 232, 379.

[4] 2 Barnard. K. B. 200, 232.

der is always destroyed, whether such coming of the remainder in fee is by the act of God, or by the act of the party.[1] For this purpose the Chief Justice mentioned the case of Harpool *v.* Kent, Sir T. Jones, 76, where there were grandfather, father, and son; the grandfather settled his estate to the use of himself for life, the remainder to the use of the father for life, the remainder to the use of his first and every other son in tail male, the remainder to his own right heirs. The grandfather died before the birth of the grandson, whereby the remainder in fee came to the father. The court was of opinion in that case that the contingent remainder was destroyed."

30. After the appointment of Lord Hardwicke as Chief Justice, the case was again argued. His lordship observed that the general questions in the case were: "1st, whether the contingent remainder was destroyed by the reversion in fee falling on the estate for life; and, 2dly, admitting that it was not, and that there might be an opening, whether this possibility would destroy the dower." He was inclined to think the remainder was destroyed. He agreed to the distinction between the several estates coming to one person by the same deed, and by distinct acts. "Kent and Harpool," he remarked, "was a very strong case, and in Purefoy and Rogers, 2 Saund. 380, the express opinion of Hale and the judges was, that the *purchasing* the remainder in fee by the tenant for life, totally destroyed the contingent remainder, and that it could never be let in again, though the particular estate were revived.[2] In the present case, indeed, there was no *descent* of the fee, because it was in abeyance during the life of William Hooker, the elder, [but] *then* the estates came to be consolidated, and therefore he thought the contingent interest was destroyed in this case, likewise. But supposing it were not so, and that there was a possibility of the estates opening in this case to let in the contingent remainder, yet he thought the plaintiff had a good title to dower, inasmuch as it was stated that William Hooker, the younger, never had any issue. The single case in the books that he found against this, was that in Croke,[3] but in Purefoy *v.* Rogers, 2 Saund. 386, Lord Chief Justice Holt, who was then counsel, said

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[1] This appears to be too broadly stated. Vide Park, Dow. 67, n. And this rule of the common law has been modified in England and some of the States by recent statutes. Supra, § 21.

[2] This seems to be too general. Park, Dow. 67, n.; see Fearne, Cont. Rem. 5th ed. p. 349.

[3] Cordal's case, Cro. Eliz. 315; ante, § 26.

Lewis Bowles' case and others were against it, and that it was not law; and in ejectment brought in Lord Bridgman's time, that case in Croke was denied by him likewise to be law, and accordingly he (Lord Hardwicke) did not take it to be so. Page, J. Here is nothing but a possibility which has never happened, nor can now happen, to distinguish this case from an estate in fee; therefore he thought the wife plainly entitled to dower. Probyn, J. The distinctions taken in this case may be allowed, and yet the widow be entitled to her dower; besides, it is impossible now the contingencies ever should happen."

31. Mr. Park has the following observations on the foregoing case: "This case certainly did not require that Cordal's case should be overruled upon the point of dower, and it is observable that both Lord Hardwicke and the other justices are reported to have laid stress upon the circumstance that the contingency was become impossible, which seems alone to distinguish it from Cordal's case. The cases in which Cordal's case is mentioned to have been denied, were *both*, no doubt, (as in Purefoy *v.* Rogers,) solely upon the point of consolidation, as to which, Cordal's case certainly can not be now supported. The judgment of Lord Hardwicke, as given above,[1] (being what appears the preferable result of the several reports,) sets the case in a somewhat different view from that in which it has hitherto appeared in the treatises. Lord Hardwicke, it seems, doubted no more than his predecessor, Sir Robert Raymond, that the subsequent *descent* of the reversion upon a tenant for life would destroy a contingent remainder; but his doubt upon this case arose from an idea that the reversion did not come to the son by descent, inasmuch as it was in abeyance during the life of the father.[2] This notion being now universally exploded as to conveyances to uses, a case circumstanced like Hooker *v.* Hooker, might, at this day, be determined on the point of the destruction of contingent remainders alone."[3]

32. Several cases are stated in the early text-books and digests, in which a union of the freehold and inheritance is prevented, and dower consequently excluded. Thus, according to Perkins: "If lands be given to two men, and to the heirs of the body of *one* of them

[1] In the report of this case, contained in Annesley, the judgment of Lord Hardwicke is supposed to be incorrectly given. Park, Dow. 68, n. (z.)

[2] Upon this point, consult Fearne on Cont. Rem. 352, 5th ed.

[3] Park, Dow. 64–71.

begotten, and he who hath the fee tail takes a wife, and dies in the lifetime of him that hath the freehold, although he that hath the freehold dies, the wife shall not have any dower, because the estate tail was not executed to all purposes in her husband; and yet if a stranger had entered after the death of him who had the freehold, the issue of the donee should have had a formedon *en le descend.* against him, and should have alleged the esplees in his father; and so to such intent the estate was executed in the donee."[1] In this case, were the estate tail to execute absolutely in the person to whom the inheritance is limited, the merger of the freehold for one moiety would sever the joint tenancy and thus defeat the intention of the donor. This the law does not permit.[2]

But the same distinction, before adverted to, is taken between the case above given and one where the inheritance comes to the husband by a separate conveyance or subsequent descent. In the latter case the freehold would be immediately merged for a moiety, and the joint tenancy consequently severed. As a result of this, the wife would be entitled to dower.[3]

33. In the following case, stated by Perkins, it is held that dower attaches: "If land be leased to A. and B. for the life of C., the remainder to the right heirs of A., and A. takes a wife, and C. dies, living A. and B., and A. dies, living B., his (*i.e.* A.'s) wife shall be endowed; because *cestuy que vie* died living A. the husband, so that the freehold and inheritance were joined in the husband *simul et semel* during the coverture."[4] In this case the joint seizin of the freehold for the life of C. prevented the remainder limited to the heirs of A. from uniting with his estate of freehold, and consequently during the continuance of that joint seizin the right of dower could not attach. But the joint seizin of the freehold being determined by the death of C., the remainder to the heirs of A. thereupon became merged and consolidated with the freehold of A., under the rule in Shelley's case, and thereby, as Perkins expresses it, "the freehold and inheritance were joined in the husband, *simul et semel.*"[5]

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[1] Perk. sec. 334; Co. Litt. 182, a.

[2] See Dyer, 9, *a*, pl. 22; ante, § 22.

[3] Co. Litt. 182, b., 183, a.; Wiscot's case, 2 Co. 60, b.; Merrill *v.* Rumsey, 1 Keb. 888; Park, Dow. 59, 60; see, also, Fearne, Cont. Rem. 30–36, 5th ed.; 3 Prest. Conv. 59–69; ante, § 25.

[4] Perk. by Greening, sec. 337.

[5] Ibid. Greening's note (*i.*); 1 Prest. on Est. 336; Park, Dow. 76.

34. So if husband and wife are tenants in *special* tail, with remainder to the right heirs of the husband, and the wife die without issue, the husband will become tenant in tail after possibility of issue extinct, or, in other words, tenant for life only. The estate for his own life thus conferred upon him, by meeting with the remainder in fee, becomes merged therein, and he is consequently seized of the freehold and inheritance in possession. The wife of a second marriage, contracted while such seizin existed, would be entitled to dower in the estate.[1]

Vesting of the contingent remainder defeats dower.

35. Upon the assumption that a right of dower attaches upon an estate executed in the husband *sub modo*, it may become a question whether, if the intervening contingent remainder come *in esse* after the title of the widow is consummated by the death of the husband, the estate arising under that remainder shall take effect subject to dower, or shall overreach and defeat that estate. The better opinion appears to be that upon the happening of the contingency and vesting of the remainder, the husband is to be regarded as having been seized of *several* estates *ab initio*, and consequently that the dower estate is defeated.[2]

Intervening possibility excludes dower.

36. The interposition of a mere *possibility*, so that it be of a freehold nature, between the life estate and inheritance of the husband, will, so long as the possibility exists, prevent a title of dower from attaching. Its effect is not merely to defeat the right of dower upon the happening of the possibility, but to absolutely prevent it from coming into existence, unless the possibility be determined during the coverture.[3] It is upon this principle that dower is denied to estates held in joint tenancy.[4] The possibility of survivorship, necessarily incident to the joint estate, operates to prevent dower from

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[1] Perk. sec. 338, and Greening's note (*k.*); 1 Roll. Abr. 677, pl. 10; Bro. Dow. pl. 25; 1 Roper, Husb. and Wife, 866; Park, Dow. 56, 57.

[2] Park, Dow. 73.

[3] Park, Dow. 72; 1 Washb. Real Prop. 156, § 8. This doctrine has no application to estates held upon condition. See post, ch. 14, §§ 3–5.

[4] Post, ch. 12, § 33, and ch. 16, §§ 1–5.

attaching. The case considered on a previous page, of a lease by tenant for life to the reversioner, for *his* (*i.e.* the reversioner's) life, is governed by the same principle.[1] In the old books the mesne reversion of the tenant for life is treated as a mere possibility.

37. It was at one time a question whether, if an estate were limited to A. for life, remainder to B. for the life of A., remainder to A. in fee or in tail, this intermediate limitation to B. conferred such an interest as would prevent the consolidation of the estate for life and remainder in fee, and exclude dower. This point was determined in Duncomb *v.* Duncomb,[2] where, upon a writ of dower it appeared by special verdict, that William Duncomb, the husband of the demandant, was tenant for life, remainder to J. S. and his heirs for the life of William, remainder to the heirs male of the body of William, with the ultimate remainder in fee to George Duncomb, the tenant to the writ. William Duncomb died without issue. The question was "whether the remainder to J. S. and his heirs for the life of William Duncomb be such an interposing estate between the estate for the life of William and the remainder to the heirs of his body, that the wife should not be endowed?" On behalf of the demandant it was urged, "that the whole estate was really in William, and the remainder to J. S. for the life of William was no more than a possibility; so that if William had committed a forfeiture, J. S. might take advantage thereof for preservation of remainders. But in the mean time the whole estate is executed in W. D., as in Lewis Bowles' case[3] the whole estate tail was executed in the father till the birth of the first son; and though by this possibility the estate for the life of William is not merged, yet the estate tail is executed to such a purpose that the wife shall be endowed." But, according to the report, "the court, upon the first argument, hastily gave judgment for the tenant."[4] The ground of the decision is not stated. Mr. Fearne, however, regards the interest of J. S. as an intervening vested estate, and not a mere possibility, as claimed in the argument.[5] Mr. Park is of the same opinion, and places the decision upon that ground.[6] He adds, that this decision has ever since been considered good law, and is sanctioned by the decisions

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[1] Ante, § 13.
[2] Duncomb *v.* Duncomb, 3 Lev. 437.
[3] Lewis Bowles' case, 11 Co. 83.
[4] Duncomb *v.* Duncomb, 3 Lev. 437.
[5] Fearne, Con. Rem. 349.
[6] Park, Dow. 74.

on the common limitations to trustees to preserve contingent remainders.[1]

The rule excluding dower where a mere possibility is interposed between the freehold and the inheritance, is very difficult to reconcile with the idea that dower may attach where there is an intermediate contingent estate which may possibly vest. Perhaps, however, in view of the favor with which the estate of dower is usually regarded by the law, the inconsistency may be said to consist in the denial of it in the one case, rather than in the recognition of it in the other.

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[1] Park, Dow. 74. And see Dormer *v.* Parkhurst, 18 Vin. Abr. 413; 3 Bro. Parl. Cas. 453; 13 East, 489, and the certificate in Colson *v.* Colson, 2 Atk. 250.

CHAPTER XII.

OF SEIZIN AS A REQUISITE OF DOWER.

§ 1. The general doctrine.
2–5. Nature and incidents of seizin.
6–11. Seizin in the United States.
12–15. Mere right of entry insufficient to give dower at common law.
16. Judgment alone against disseizor inoperative to confer seizin.
17. Execution served by the heir insufficient to give dower.
18. Necessity of actual entry abrogated by statute in England.
19–21. The doctrine in the United States.
22, 23. Effect of death of bargainee before enrollment.
24–26. Seizin in law sufficient to give dower.
§ 27. Conveyances under the statute of uses.
28. Shifting uses.
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30. Seizin of incorporeal hereditaments.
31, 32. Tortious seizin.
33. Joint seizin.
34, 35. When rendered sole by relation.
36–38. Transitory seizin.
39–46. Conveyance, and simultaneous reconveyance by mortgage.
47, 48. Requisites of the rule making such seizin transitory.
49. Instantaneous seizin.

The general doctrine.

1. It was an inflexible rule of the common law that the right of dower could not attach upon any estate of which the husband had not been *seized*, either in *deed* or in *law*, at some period during the coverture; and the courts, both of law and equity, were accustomed to enforce this rule with great rigor and severity. A mere right to, or interest in land, unless accompanied by technical seizin, was deemed insufficient to confer a title of dower.[1] Some degree of familiarity with the general principles which fix and determine the legal requisites of seizin, is necessary, it will be perceived, to a proper understanding of the full force and effect of this rule. To this subject, therefore, we will now briefly give our attention.

[1] Litt. sec. 86; Perk. sec. 301; Fitzh. N. B. 147, (E.); Co. Litt. 31, a.; Park, Dow. 24; Tud. Cas. 45.

Nature and incidents of seizin.

2. Under the old feudal system the mode of transferring a freehold was by corporeal investiture, or *livery of seizin*, and this ceremony was absolutely necessary to a perfect and complete transfer of the estate. It consisted, simply, in an open and notorious delivery of the possession to the proposed tenant of the freehold, in the presence of the *pares curiæ*, or peers of the lords' court; and this was usually effected by the lord of the manor, or some one authorized to act in his name, going upon the land with the tenant, and making a symbolic delivery of the possession to him by placing in his hand some portion of the premises, such as a turf or a twig severed therefrom, the *pares curiæ* acting as witnesses of the transaction. This act of investiture was denominated *livery of seizin.* No deed or other writing was necessary to perfect the title of the tenant, though it was not an uncommon practice, as a means of preserving some evidence of the transfer, to record, in what were termed *brevia testata*—corresponding to some extent with deeds of modern date—the nature of the services which the tenant was to render, and the terms and conditions upon which he was to hold the land. This record was authenticated by the seal and name or mark of the lord, attested by some of the *pares.* The formality of livery of seizin being completed, the party thus placed in possession became, to all intents and purposes, *seized in deed*, as tenant of the freehold.[1]

3. Although the system of military tenures was abolished at a comparatively early period, yet many of its peculiar features had become so interwoven with the law of real property, that it became a matter of great difficulty, if not indeed almost an impossibility, to make a thorough and entire abolition of all the incidents of the system. The rule requiring livery of seizin became engrafted upon the common law, and was preserved in England until the 8th and 9th of Victoria, (1845,) at which time it was finally abolished. In modern English practice livery of seizin was exactly similar to the investiture of the feudal law, and in common law conveyances was indispensable to a complete transfer of title to the purchaser. The mere signing and sealing of a deed of feoffment of lands, unless possession were formally delivered by the feoffor to the feoffee, was in no

[1] 1 Sulliv. Lect. 142, 145; Co. Litt. 266, b. n. 217; Stearns' Real Act. 2, 8; 1 Spence's Eq. Juris. 139, 160; 1 Washb. Real Prop. 82, 83; Green v. Liter, 8 Cranch, 229.

instance sufficient to transfer an estate of freehold. It did not convey the estate itself, but was regarded merely as evidence of the nature of the conveyance. Without the formality of livery of seizin, the deed passed only an estate at will.[1]

4. Livery of seizin at common law consisted of two kinds: livery *in deed*, and livery *in law*. The feoffor might go upon the premises with the feoffee, and there, taking the ring of the door of the principal mansion, or a turf or a twig, deliver the same to the feoffee in the name of seizin; or he might say to the feoffee, "I am content that you should enjoy this land according to the deed," or words of similar import. Either of these modes constituted livery of seizin *in deed;* but so strict was the law that a mere delivery of the deed on the premises was not sufficient. It was necessary that it should be delivered in the name of seizin. Livery *in law*, was where the feoffor and feoffee went within sight of the premises, and the former said to the latter, "I give you yonder house, or land; go and enter into the same, and take possession of it accordingly." If the feoffee entered in pursuance of this authority during the lifetime of the feoffor, the seizin was complete. Or if he could not enter without endangering his life, it was sufficient for him to venture as near as might be consistent with his safety, and there make claim to the land. This was also sometimes called a *constructive* seizin; and the same term has been applied to cases where a grantee, or the heir, of several parcels of land in the same county, enters into one parcel in the name of the whole, which he may do where there is no conflicting possession of the parcels not actually entered upon. Livery of seizin being thus made, the feoffee became invested with the legal title of the freehold, and was said to be seized thereof *in deed*.[2]

5. *Seizin in law*, is where title is cast upon a person by operation of law. Title to lands acquired by descent is an instance of this. Before entry the heir is said to be seized *in law*. But an actual entry upon the lands, either in person, or by some properly authorized agent, is necessary at common law, to invest him with seizin *in deed*.[3]

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[1] 1 Inst. 48, a.; 4 Greenl. Cruise, 67, § 5.

[2] 4 Greenl. Cruise, p. 67, §§ 8, 9, and p. 70, §§ 11, 12, 13; Litt. sec. 417, 418, 419; Co. Litt. 48, a. b.; Thoroughgood's case, 9 Co. 136, a.; Vaughan *v.* Holdes, Cro. Jac. 80; Parsons *v.* Perns, 1 Mod. 91; Dow *v.* Stock, Gow R. 178; McLardy *v.* Flaherty, 8 Kerr, N. B. Rep. 455.

[3] Litt. sec. 448; 1 Roper, H. and W. by Jacob, 352, 353. As to the effect of conveyances under the statute of uses, see *infra*, § 27.

Seizin in the United States.

6. It may be stated as a general proposition that the common law mode of conveyance by feoffment and livery of seizin, was never adopted in the United States.[1] There are, however, some faint traces of the use of livery of seizin to be discovered in the early history of New England, and perhaps in some other portions of the country. Mr. Sullivan, in his treatise on Land Titles, says the ceremony was practiced in the early settlement of the country, and refers to an instance where the colony of Plymouth made livery to Vines and Oldham of their patent on Saco River, in 1642. And he adds that it was observed in York, Maine, until 1692.[2] Judge Sharswood expresses the opinion that prior to the statute of Frauds and Perjuries of 21st March, 1772, a parol feoffment, with livery, was a valid conveyance of lands in Pennsylvania.[3] Massachusetts dispensed with livery of seizin by statute in 1642. In Plymouth it was superseded at an early date, by deed acknowledged and recorded.[4] And the mode of conveying lands by feoffment with livery of seizin was also long since abolished in New York by statute.[5] In many of the States it was never heard of in actual practice.[6]

7. In this country the conveyance of lands is generally, if not universally, regulated by statute in the several States; each State for itself prescribing what acts or formalities shall be necessary to pass title to, or an interest in, lands within its own particular jurisdiction. Generally, also, a deed made, acknowledged, delivered, and recorded in the manner prescribed by statute, is all that is required to render a transfer of the title complete, and to invest the purchaser with seizin *in deed* of the lands conveyed. The recording of the conveyance is regarded, in many of the States, as the legal equivalent for livery of seizin. In other States, the mere delivery of the deed, without registration, operates to pass a perfect title, as against the grantor and his representatives, and all other persons having notice of the rights of the grantee. In some instances, also, the enactments go so far as to make an unrecorded deed good as against judgment

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[1] 4 Kent, 84; 1 Spence, Eq. Juris. 156.
[2] 1 Washb. Real Prop. 34, note 1.
[3] Ibid.; Smith, Land. and Ten. Morris' ed. 6, note.
[4] Colony Laws, 85, 86; 1 Washb. Real Prop. 34, note 1.
[5] 1 Rev. Stat. p. 738, § 136; ed. 1829.
[6] Davis v. Mason, 1 Pet. 503, 508.

creditors, whether with or without notice.[1] In several of the States, however, the registry of the deed is made an essential prerequisite to its validity, and a failure to comply with this statutory requirement is as fatal to a claim of seizin under such deed, as was the omission of livery of seizin to a feoffment at common law. An old statute of Massachusetts, passed in 1652, declared that a sale of lands should not be good unless made by deed acknowledged and *recorded* according to law.[2] But this enactment has long since been repealed.[3] In North Carolina, however, in the case of Thomas *v.* Thomas,[4] it was held, under a statute of that State, that registration of a deed for lands is necessary to make the seizin complete. And the Tennessee act of 1831 is substantially to the same effect.[5] But this is the utmost limit to which any of the statutes or reported cases go. It is believed that in no State is an actual entry necessary, where there is no adverse possession at the time of the conveyance, to give such conveyance validity, or to confer upon the grantee seizin in deed of the premises conveyed. The exception introduced in cases of adverse possession will be noticed on a subsequent page.[6]

8. A case showing the necessity of registration as against a subsequent purchaser without notice, even where possession has been taken, is reported in Massachusetts. A grantee of lands entered and enjoyed them for a time, and afterwards reconveyed to the grantor. Neither of the deeds was recorded. Subsequently the original grantor conveyed the same lands to a third person, who was entirely ignorant of the prior conveyances, and it was held that as against such purchaser, the first grantee had no seizin upon which

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[1] 4 Greenl. Cruise, *45, n., and *47, n., 1 Ibid. 340, n.; 1 Hilliard, Real Prop. 2d ed. 82, § 18; 1 Washb. Real Prop. 36, § 84; Smith, Land. and Ten. Amer. ed. 6, n.; M'Kee *v.* Pfout, 3 Dall. 486, 489; Pidge *v.* Tyler, 4 Mass. 546; Knox *v.* Jenks, 7 Mass. 488, 494; Goodwin *v.* Hubbard, 15 Mass. 210, 214; Clay *v.* White, 1 Munf. 162, 170; Barr *v.* Galloway, 1 M'Lean, 476; Proprietors, &c. *v.* Permit, 8 N. H. 512; Ward *v.* Fuller, 15 Pick. 185; Holt *v.* Hemphill, 8 Ohio, 232; Helfenstine *v.* Garrard, 7 Ohio, part 1, 275; Hall *v.* Ashby, 9 Ohio, 96; Borland *v.* Marshall, 2 Ohio State, 314.

[2] Colony Laws, 85; 1 Washb. Real Prop. 34, n.

[3] See Rev. St. Mass. (1836,) 407, § 28.

[4] Thomas *v.* Thomas, 10 Ired. 123. See, also, Tolar *v.* Tolar, 1 Dev. Eq. 456; Morris *v.* Ford, 2 Dev. Eq. 418; Tate *v.* Tate, 1 Dev. & Bat. Eq. 22, 28.

[5] See Chester *v.* Greer, 5 Humph. 26; also Stribling *v.* Ross, 16 Ill. 122, for the rule in that State.

[6] Infra, § 21.

dower could attach.[1] So in Talbot *v.* Armstrong,[2] where a grantee of lands failed to pay the purchase money or get his deed recorded, and afterwards surrendered the deed to the grantor, who conveyed to a third person, it was held that as against the latter, who had no notice of the first deed, it was void, and the widow of the first purchaser had no right of dower.

9. And where a fraudulent grantee of lands conveyed the same to an innocent purchaser, who neglected to put his deed upon record, or take possession, until after proceedings had been instituted by the creditors of the fraudulent grantor to subject the lands to the payment of their demands, it was held that his widow was not entitled to dower.[3]

10. The delivery of the conveyance to a third person for the benefit of the grantee, although the latter had not participated in the purchase, and was entirely ignorant of the transaction, will give the grantee such seizin as to entitle his widow to dower. Thus, in North Carolina, where a father purchased land, and took a conveyance to his son, with an intent to give him the land, it was held that the title vested in the son, so as to entitle his wife to dower, though the deed was delivered to the father without the knowledge of the son.[4]

11. The common law distinction between seizin in deed and seizin in law may likewise be said to be in a great measure obliterated in the American States.[5] In this country, for most purposes, the heir is considered actually seized without entry.[6] Some of the cases, however, do not recognize, in its full extent, this innovation upon the

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[1] Emerson *v.* Harris, 6 Met. 475.

[2] Talbot *v.* Armstrong, 14 Ind. 254.

[3] Stribling *v.* Ross, 16 Ill. 122. The Illinois statute provides that "all deeds, mortgages, and other instruments of writing which are required to be recorded, shall take effect, and be in force from and after the time of filing the same for record, and not before, as to all creditors, and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record." The above case was decided upon the construction given this statute. See, also, Martin *v.* Dryden, 1 Gilm. 187.

[4] Tyson *v.* Tyson, 2 Ired. Ch. 137.

[5] Bush *v.* Bradley, 4 Day, 305, 306, approved in Chew *v.* Com's of Southwark, 2 Rawle, 160; Walker's Intr. 2d ed. 268, 314; Burrill's Law Dict. tit. "Seizin."

[6] 1 Hilliard, Real Prop. p. 82, § 18. See Brown *v.* Wood, 17 Mass. 68; Green *v.* Chelsea, 24 Pick. 71, 78; Davis *v.* Mason, 1 Peters, 506; Jackson *v.* Sellick, 8 John. 208; Borland *v.* Marshall, 2 Ohio St. R. 308.

common law. Thus, while it has been held that the law gives to the heir or devisee constructive seizin of wild or vacant lands without entry or other equivalent act of seizin, the contrary has been determined with respect to improved lands.[1] This point is of but little importance, however, to the consideration of the right of dower, for the reason, as will hereafter be shown,[2] that seizin in law is equally effectual with seizin in deed, to enable the right to attach.

We pass now to the further consideration of the main subject of this chapter.

Mere right of entry insufficient to give dower.

12. It has been remarked, that at common law, seizin by the husband, either in deed or in law, at some period during the coverture, was an essential requisite of dower.[3] A mere right of entry was insufficient to confer that estate. The extent to which this doctrine was carried is well illustrated by many cases to be found in the old books. Thus, in a case put by Perkins, it is said that "if a man seized of land in fee be disseized of the same, and then take a wife, and die without re-entering, she shall not have dower."[4] The material point in this case, it will be observed, consists in the fact that the seizin of the husband was divested by the entry of the disseizor *before* the marriage, and continued thus divested during all the period of the coverture. The husband had a right of entry upon the lands, but this was not sufficient to give dower to the wife. Had he defeated the wrongful estate of the disseizor by ousting him from the possession at any time during the coverture, the seizin would have been restored to him, and his wife would have been entitled to her dower; but inasmuch as the right of entry was not asserted, there was no moment of time during the coverture when, in contemplation of law, he was seized of the premises. This is one of the instances mentioned by Perkins in which the husband may prejudice the wife in her dower by his laches of entry.[5]

13. Another case, of similar import, is also given by Perkins: "If a man die seized in fee, and a stranger abates in the same land,

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[1] Jackson *v.* Howe, 14 John. 405; Ward *v.* Fuller, 15 Pick. 185; Brown *v.* Wood, 17 Mass. 68; Green *v.* Chelsea, 24 Pick. 78.

[2] Infra, § 24. [3] Ante, § 1.

[4] Perk. sec. 366; and see Co. Litt. 222, a.; Winnington's case, 2 Co. 59.

[5] Perk. sec. 366.

and after the abatement the heir marries, and dies without entering thereon, his wife shall not have dower of the same land."[1] Here, it will also be noticed, the seizin which the law cast upon the heir at the death of the ancestor, was divested by the abatement *before* the marriage, and, as in the preceding case, the right of entry which existed in the husband, and which was insufficient to confer dower, was not prosecuted to an actual seizin during his lifetime. Hence, there was no seizin during the coverture, and no title of dower could attach on behalf of the wife.[2] The result would be the same in a case where the ancestor has been disseized during his lifetime, and dies before entry. Under such circumstances a mere right of entry would descend to the heir, and in respect of such right it would make no difference whether it came to him before or after the marriage. In either case, until he prosecuted the right to an actual seizin, the wife would not be entitled to dower.[3] According to a recent decision, however, an abatement can not take place, if the land be in the possession of a tenant for years.[4]

14. The same principle has been applied to the case of land held upon condition on the part of the grantee: "And if a man enfeoff a stranger upon condition on the part of the feoffee, and the feoffor marries a wife, and the condition is broken, and the feoffor dies without an entry made by him, or by any other in his name, his wife shall not have dower of the land."[5] The reason of this is, that an entry or claim for condition broken is necessary to revest the estate in the grantor, and, until that be made, he has no more than a right or title of entry for such breach.[6] The same doctrine applies where there has been a forfeiture for waste: "If a man seized in fee of one acre, lease it to a stranger for life; and after takes a wife, and the lessee doth waste, and the lessor dies, his wife shall not have dower of this land."[7]

15. So in case of an exchange of lands before marriage, an entry was necessary, at common law, to perfect the seizin and give a right of dower: "If J. S., seized in fee of one acre of land, exchange the

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[1] Perk. sec. 367.
[2] Plow. 371; 1 Greenl. Cruise, 170, § 20.
[3] Park, Dow. 26.
[4] Bushby *v.* Dixon, 3 Barn. & Cress. 298, 10 Eng. C. L. 85; see infra, § 25.
[5] Perk. sec. 368.
[6] Park, Dow. 25; 4 Kent, 38; Thompson *v.* Thompson, 1 Jones' Law R. (N. C.) 430, 431; see Beardslee *v.* Beardslee, 5 Barb. (N. Y.) R. 324.
[7] Perk. sec. 374.

same acre with T. K. for another acre in fee, and J. S. enters and executes the exchange for his part, viz. for the acre which was put in exchange to him; and T. K. takes a wife, and dies without entering by force of the exchange, now his wife shall not have dower of the one acre, nor of the other. And the reason is, because the husband was not seized of that land, either in deed or in law, during the coverture."[1]

Judgment alone inoperative to confer seizin.

16. The prosecution of a right or title, even to judgment, if the husband died before entry or execution served, was formerly ineffectual to entitle the widow to dower, for the judgment alone, it was determined, could not confer a seizin. "If a man hath judgment to recover land, and marries, and dies before entry or execution sued, his wife shall not have dower."[2] This rule, before the changes introduced in England by recent statute, was held to apply, not only to recoveries in adverse suits, but also to common or feigned recoveries; and it was decided that until the return of the writ of execution, or, at least, until seizin was delivered, no seizin was in the recoverer, and consequently that no use could arise.[3]

Execution served by the heir ineffectual to confer dower upon the widow of the ancestor.

17. So strict was the common law, in this respect, that service of execution after the death of the ancestor, at the instance of the heir, would not inure to the benefit of the widow of the ancestor, although when completed it had, in law, relation back to the act of the ancestor, and was held to let in the heir by descent.[4] This fictitious seizin, or seizin by relation, was admitted for the purposes of tenure only, and the courts refused to so extend it as to confer upon the ancestor the incidents of actual seizin, or upon his widow the right to dower. The following quotation from Perkins, though somewhat obscurely worded, furnishes an illustration of this proposition: "And

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[1] Perk. sec. 369. [2] Ibid. sec. 370; Plow. 43 is to the same effect.

[3] Jenk. Cent. 249, Ca. 40, pl. 4; Witham v. Lewis, 1 Wils. 48, 55; Shelley's case, Sir W. Jones; 10 Moor. 141; Park, Dow. 26; and see 4 Bro. P. C. 510; 1 Prest. Conv. 149.

[4] Shelley's case, cited in preceding note; Jenk. 249; Co. Litt. 361, b.

if there be husband and wife, and the husband is seized of one acre of land by a wrongful title, and is impleaded of the same acre by him that hath the right, and vouches a stranger to warranty, who enters into the warranty and loses; and each of them hath judgment to recover against the other,[1] and the demandant enters, and the husband dies before execution sued against the vouchee, now his wife shall not have dower of this land [recovered by her husband];[2] although the heir of her husband sue forth execution, and this land cometh in lieu of the land of which the husband was seized during the coverture."[3]

Necessity of actual entry abrogated by statute in England.

18. Many of these subtle distinctions of the common law have been removed with regard to claims for dower arising under marriages contracted since January 1st, 1834, by the passage of the 3 & 4 William IV., chapter 105.[4] The third section of that act provides as follows: "When a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof, provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced." As to marriages contracted prior to the date above named, the rule of the common law is still in force.[5]

In what cases actual entry required in the United States.

19. The doctrine of the common law, requiring an actual entry in case of adverse possession, and treating the seizin as lost to the real owner without such entry, has not been adopted to any considerable extent in the United States. The statutes of Maine, Michigan, Missouri, and Arkansas expressly declare that the fact that the

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[1] That is to say, the demandant hath judgment to recover against the tenant, and the tenant to recover over in value against the vouchee. Park, Dow. 27, note.

[2] These words, which accord perfectly with the sense of the passage, are added by Mr. Greening.

[3] Perk. by Greening, sec. 875; and see Bro. Dow. pl. 9 and 18.

[4] Stat. at Large, vol. lxxiii. p. 999. See Appendix.

[5] 2 Sudgd. Vend. & Pur. 222.

grantor in a deed is disseized at the time of the conveyance, shall be no bar to the operation of the deed.[1] Such, also, is held to be the effect of the legislation in Ohio. In a recent case decided in that State, the Supreme Court used this language: "That livery of seizin has never been essential, in Ohio, to the creation of a freehold estate, nor an entry necessary to perfect the title of an heir or devisee, is well known to every lawyer. The most common instrument of conveyance is a deed of bargain and sale, which, without the aid of a statute of uses, transfers both the legal and equitable estate. Nay, further, a mere deed of quit claim or release is sufficient, even where the releasee has no prior interest in the land. But our departure from the English law does not stop here. For an adverse possession does not prevent the transfer of title either by deed, descent, or devise. Whatever title is held by the grantor, ancestor, or testator, may be thus transferred, notwithstanding the lands are adversely held by another. *Holt* v. *Hemphill*, 8 Ohio Rep. 232; *Helfenstine* v. *Garrard*, 7 Ohio Rep. pt. 1, 275; *Hall* v. *Ashby*, 9 Ohio Rep. 96. It might seem, from what was said in *Holt* v. *Hemphill*, that an adverse possession would be fatal to a deed; but that such possession in no wise affects it, was expressly decided in *Hall* v. *Ashby*."[2] In general terms, the same doctrine may be said to prevail in a large proportion of the States.

20. In some of the States a mere right of entry will give dower, although such right is not sufficient to support a conveyance as against an adverse possession. Thus, in Virginia, it is provided that "when a husband, or any other to his use, shall have been entitled to a right of entry, or action, in any land, and his widow would be entitled to dower out of the same if the husband or such other had recovered possession thereof, she shall be entitled to such dower, although there shall have been no such recovery of possession."[3] Similar statutes have been adopted in Kentucky[4] and the District of Columbia.[5]

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[1] 4 Greenl. Cruise, 66, note; 2 Comp. Laws Mich. 838, § 7.

[2] Borland *v.* Marshall, 2 Ohio St. Rep. 308, 313; see, also, Bush *v.* Bradley, 4 Day, 298; Chew *v.* Com's of Southwark, 2 Rawle, 160; Strudwick *v.* Shaw, 1 Hay. 5; Tyson *v.* Harrington, 6 Ired. Eq. 333.

[3] Code of Va. (1849,) p. 474, § 2; copied, substantially, from 3 & 4 Will. IV. ch. 105, § 8.

[4] Rev. Stat. Ky. (1852,) p. 393, § 5; Stanton's Rev. vol. ii. p. 22, § 5.

[5] Rev. Code Dist. Col. (1857,) p. 200, § 6.

21. In several of the States, the old English rule, though in a somewhat modified form, is recognized and applied. In New York a statute was enacted, many years since, which declared that "every grant of lands shall be absolutely void, if, at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor."[1] A similar statute has been adopted in Kentucky.[2] But this statute does not apply when the grantee, in person, or by tenant, is in possession when the deed is made; nor where the deed is made to carry into effect a contract entered into prior to the passage of the enactment.[3] In Massachusetts, where the owner of lands who had been disseized, made a deed of conveyance without having entered upon them, it was held that his deed passed no seizin to the grantee, and that the widow of the latter was not entitled to dower.[4] It is sufficient, however, where the rightful owner has been disseized, and he wishes to make a valid conveyance of the title, for him to go upon some part of the premises with the vendee, and there deliver his deed, the seizin, in such case, passing with the deed.[5] Thus, in Oakes *v.* Marcy, where certain heirs at law had been disseized, but had not lost their right of entry, and entered upon the lands, and there delivered their deed to the grantee, it was adjudged that the disseizin was so far purged by the entry as to give operation to the deed.[6]

Death of bargainee before enrollment.

22. A difference of opinion appears to have prevailed among the early text writers and judges, with respect to the effect of the death of a bargainee of lands before enrollment. In one portion of his work on Uses, Chief Baron Gilbert states the law upon this point as follows: "If lands are bargained and sold, and the bargainee dies before enrollment, his wife shall not be endowed; for the right of dower is, according to the rules of the common law, consummate by

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[1] 1 Rev. Stat. 739, § 147.

[2] Rev. Stat. Ky. p. 164, ch. 12, § 2; Kinsolving *v.* Pierce, 18 B. Mon. 782; Cardwell *v.* Sprigg, 7 Dana, 37.

[3] Chiles *v.* Jones, 7 Dana, 529.

[4] Small *v.* Procter, 15 Mass. 495; 4 Dane's Abr. 16.

[5] 1 Washb. Real Prop. 85, § 80; Green *v.* Liter, 8 Cranch, 247, 250; Ellicott *v.* Pearl, 10 Pet. 412; Spaulding *v.* Warren, 25 Verm. 316.

[6] Oakes *v.* Marcy, 10 Pick. 195; see, also, accord. Knox *v.* Jenks, 7 Mass. 488, 493; as to what constitutes a sufficient re-entry, see Buckitt *v.* Spofford, 14 Gray, 514.

the death of the husband; and at the death of the husband, the bargain and sale had no effect to vest the lands in him; and though the freehold, after enrollment, has a retrospect to the date of the deed, *yet there can not thereby arise to the wife a new title of dower* contrary to the rule of common law, without an express provision of the statute."[1] But on a subsequent page he states the rule to be exactly the contrary of this: "If the estate shall be said to pass as to strangers, *ab initio*, (by relation,) for their disadvantage, it shall pass for their advantage. And therefore, if a bargain and sale be made to a man, and he dies, and then the deed is enrolled, it seems his wife ought to be endowed."[2] In Dimmock's case,[3] it was agreed by all the justices in the Court of Wards that where the death of the bargainee occurs before enrollment, the seizin by relation arising in virtue of the subsequent enrollment, is not effective for the purposes of dower. And in Sheppard's Touchstone, the point is said to have been ruled the same way on two occasions: "If A. bargain and sell his land held in capite, to B. in fee, and B. dieth before enrollment, and then the deed is enrolled; in this case the heir of B. shall be in ward. (Contrarium tent. per Just. Berkley, Hil. 11 Car.) And so it was held by all the justices in Sir Walter Earl's case, Pasch. 15 Jac. Curia Ward. And yet in this [case] the wife of the bargainee shall not have dower, as was held by Anderson, Chief Justice, and Justice Walmsley, 3 Jac. Co. B., and again in Sir Robert Barker's case, 6 Jac."[4] But Mr. Preston, in his edition of the work, remarks that this ruling is not law at the present day, and cites Owen, 70, in support of his opinion. In this view he is also supported by the editor of Gilbert on Uses, who remarks that "if it be once admitted, that after enrollment, the fee is in the bargainee by relation, all the consequences of a seizin in fee from the date of the deed must follow. . . . Therefore his wife must be dowable."[5] And it is said in Cro. Car. 217 that the widow of Baron Freville was awarded dower in a case of this description. The same principle was applied to Freebench by the Court of King's Bench, in the modern case of Vaughan *v.* Atkins.[6] In that case, after long argument, in which the attention of the court was called to the principal case from Sheppard, above noticed, the court held that the admittance of the heir of a surrenderee of customary free-

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[1] Gilb. Uses, 96.
[2] Gilb. Uses, 292.
[3] Dimmock's case, Owen, 149.
[4] Shep. Touch. 226.
[5] Gilb. on Uses, by Sugden, 218, note.
[6] Vaughan *v.* Atkins, 5 Burr. 2765.

hold, would have such relation to the surrender as to entitle the widow of the surrenderee to Freebench. "The vendor, his widow, and his heir, and all claiming under him," said Lord Mansfield, "are concluded from saying, after admittance, that the land did not pass from the day of the surrender. Upon that ground, the lessor of the plaintiff claimed the inheritance, whereof his brother (the surrenderee) died seized; and it should not be in his mouth to say, against the widow, that his brother did not die seized."[1] Mr. Park dissents from this conclusion: "His lordship, therefore," he observes, "seems to have denied that there may be a seizin by relation for some purposes, and not for other purposes; a position which it would be difficult to reconcile with many cases in the old books. The argument of the Chief Justice would just as well prove that the wife of a recoverer who dies before execution served, may, after the recovery is executed to the heir, claim her dower."[2]

23. In the American Reports a case or two may be found where the doctrine of relation was applied very much to the prejudice of the widow. These cases, however, are the converse of those referred to in the preceding section. Thus, in North Carolina it has been determined that registration of a deed is necessary to invest the grantee with seizin and entitle his widow to dower;[3] yet, where the husband conveyed certain lands, (the concurrence of the wife not being necessary under the laws of that State to divest her inchoate right of dower,) but the deed was not registered until after his death, it was decided that such registration related back to the date of the conveyance, and defeated the dower of the grantor's widow.[4] The

[1] Vaughan v. Atkins, 5 Burr. 2787.

[2] Park, Dow. 80. Mr. Roper supports the doctrine of Lord Mansfield. "If the husband's title to the estate depend upon a bargain and sale (which by the statute of Henry the Eighth, [27 Hen. 8, ch. 16,] must be enrolled within six months after its date,) and he die before the enrollment, but after the expiration of the six months, his widow will not be entitled to dower, because the bargain and sale was void, and consequently there was no seizin in the husband. The reverse, however, would be the case if the husband had died within the six months, and the bargain and sale had been enrolled within that period; for the enrollment has relation to the date of the bargain and sale, so that the husband in his lifetime was seized of an estate of inheritance." 1 Roper, Husb. and Wife, by Jacob, 886. In a note he adds: "This seems to be the better opinion, though some of the authorities are at variance."

[3] Thomas v. Thomas, 10 Ired. 123.

[4] Norwood v. Marrow, 4 Dev. & Bat. Law R. 442. "If A. bargain and sell his land to B. in fee, and then marry C. and die, and C. is endowed, and after the deed is enrolled; in this case the dower of the woman shall be taken away by relation." Shep. Touch. 226; Cro. Car. 217, 569.

same question was ruled the same way in Tennessee.[1] And in Massachusetts, where lands were conveyed by the husband prior to the marriage, but the deed was neither acknowledged nor recorded, it was held that no right of dower attached.[2] But in that State, and probably in Tennessee, a deed is valid and effectual against the grantor and his heirs without registration. The doubt arising in the English law with respect to the consequences of an omission to make an enrollment during the lifetime of the husband, is dissipated by the act of 3 and 4 Will. IV. above referred to, in all cases coming within its operation.[3] In the United States the general rule is that an unregistered deed is good, not only against the grantor, his heirs and devisees, but also as against all persons having notice of the rights of the grantee;[4] and therefore, as against all such persons, the wife is entitled to her dower. With regard to a portion of the States, however, as already noticed, this general proposition is subject to some degree of qualification.

Seizin in law sufficient to confer dower.

24. The rule of the common law making technical seizin of the husband an essential requisite of dower, did not require an actual seizin, or seizin in *deed*, but was satisfied with what is termed a seizin in *law*.[5] "And of seizin and possession in *law*, the wife shall be endowed."[6] Therefore, if lands descended upon a man who was married, or who entered into the marital contract at any time during the continuance of the seizin, his wife was held dowable of such lands, even though he died before entry;[7] nor did it make any difference, where the lands descended during the coverture, that a stranger entered and abated on the death of the ancestor; for, in contemplation of law, there was an interval of time between the death of the ancestor and the entry of the abator, during which the heir had a seizin in law.[8] Indeed, this seizin of the heir is said to be a continu-

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[1] Chester *v.* Greer, 5 Humph. 26.

[2] Blood *v.* Blood, 23 Pick. 80.

[3] Sec. 1.

[4] Supra, § 7.

[5] Co. Litt. 31, a.; Litt. sec. 448, 681; Perk. sec. 304, 370; Bro. Ab. tit. Dower, pl. 75; Sir W. Jones, 361; 2 Bl. Com. 131; 4 Kent, 37.

[6] Perk. sec. 304.

[7] Fitzh. N. B. 149; Perk. sec. 372; Litt. sec. 448, 681; Co. Litt. 31, a.; Gilb. Dow. 391; Bro. Dow. 75; Park, Dow. 81.

[8] Park, Dow. 82; 4 Kent, 37, 38; see Perk. sec. 371; Co. Litt. 31, a.; 1 Greenl. Cruise, 170, § 20.

ation of the ancestor's inheritance.[1] The difference between the case here stated, of a title acquired by descent *during coverture*, where, by operation of law the heir is *eo instanti* invested with seizin, and the case noticed in a previous section,[2] where the abatement is supposed to take place *before* the marriage, is very distinctly marked. In the latter case a mere right of entry, or of action, exists in the heir at the time when the coverture commences, which right he fails to prosecute to actual seizin. In the former case there is an instant of time during the coverture in which the husband is, in law, seized of the lands; this instantaneous seizin is sufficient to enable the right of dower to attach, and a subsequent disseizin is not permitted to divest the right so attaching.

25. The same principle applies to the following case found in Perkins: "If land be leased for life, the remainder to J. S. in fee; and J. S. marries, and the lessee dies, and a stranger enters, and J. S. dies before any entry made by him, his wife shall have dower of the same land."[3] Here, upon the very instant of the death of the tenant for life, the remainder-man becomes seized in law of the freehold; the subsequent *intrusion*, while operating to divest this seizin, can not affect the right of dower which, by reason thereof, has already attached.[4] But, such were the nice and shadowy distinctions sometimes taken, that a different result was supposed to follow, where, upon the determination of a particular estate, the tenant of that estate held over. In such case it was considered necessary for the husband to enter and acquire a seizin in order to entitle his wife to dower.[5] This distinction was placed upon the ground that where a particular tenant held over after his estate was determined, the implied seizin which would otherwise have devolved on the remainder-man was thereby intercepted; for the particular tenant had a continuing seizin of the freehold, though under a wrongful title.[6] But where lands were in the occupation of tenants under leases for years, it was held that the reception of the rents after the determination of the particular estate, by the person whose particular estate was determined, although under claim of ownership of the freehold, would not operate as a deforcement, for the reason that the posses-

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[1] 1 Roper, Husb. and Wife, 353.
[2] Ante, §§ 12, 13.
[3] Perk. sec. 372.
[4] Park, Dow. 32.
[5] Bro. Dow. pl. 29; 4 Kent, 38.
[6] Park, Dow. 32, 33.

sion of the termors for years would preserve the seizin of all persons becoming entitled to the reversion.[1]

26. In this country, as in England, seizin in law is invariably regarded as sufficient to support a title of dower.[2] Indeed, as we have seen, in many of the States, the distinction between seizin in deed and seizin in law is practically abolished.[3]

Conveyances under the Statute of Uses confer seizin in law.

27. On a conveyance under the statute of uses, the bargainee or *cestui que use*, by operation of the statute, is seized in law immediately on the delivery of the deed. His widow, therefore, without reference to the late English dower act, would be dowable, although there had been no entry made, nor other act done by the husband to acquire a seizin in fact.[4] This principle has been resorted to in modern English practice, as a means of avoiding the necessity of an actual entry, in cases of exchange and partition. It has become usual to make exchanges and partitions by conveyances to uses, under which the estates are executed immediately on the delivery of the deed, and the right of dower attaches without any entry by the husband. And in the case of a bargain and sale under a common law authority to executors to sell, as the vendee, when ascertained by the instrument, is considered as a devisee, and the seizin is consequently transferred to him from the heir without entry, the same position would seem to hold good.[5]

Shifting uses.

28. Another peculiarity of the doctrine of uses is that the freehold may be made to shift from one person to another without the

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[1] Carhampton *v.* Carhampton, 1 Ir. Term Rep. 576; Park, Dow. 33. And see Bushby *v.* Dixon, 3 Barn. & Cress. 298, 10 Eng. C. L. 85, where it is held that an abatement can not take place if the land be in the possession of tenant for years.

[2] Green *v.* Liter, 8 Cranch, 247; Blood *v.* Blood, 23 Pick. 80; Atwood *v.* Atwood, 22 Pick. 283; Green *v.* Chelsea, 24 Pick. 78; Eldredge *v.* Forrestal, 7 Mass. 253; Brown *v.* Wood, 17 Mass. 68; Ware *v.* Washington, 6 Smedes & Marsh. 737; Mann *v.* Edson, 39 Maine, 25; Borland *v.* Marshall, 2 Ohio St. R. 308; Secrest *v.* M'Kenna, 6 Rich. Eq. 72; Bowen *v.* Collins, 15 Geo. 100; 4 Kent, 89; 1 Washb. Real Prop. 173, § 5; 1 Hilliard, Real Prop. 82, § 18, 2d ed.

[3] Ante, § 11.

[4] Gilb. Uses, 96; Park, Dow. 34; 2 And. 161; 1 Greenl. Cruise, 171, § 21.

[5] Park, Dow. 35.

formality of a common law entry. In these cases, therefore, it would seem that if the tenant of the estate which is defeated by force of a conditional limitation, or proviso of cesser, holds over after the event, if he has the freehold at all, it would be under a new seizin, the result of a constructive disseizin of the person entitled to the benefit of the limitation or proviso. In this case, then, there would seem to be an intermediate seizin in law in the person in whose favor the shifting use operates, and if so, his wife would be dowable notwithstanding the deforcement.[1]

The doctrine of Uses in the United States.

29. The Statute of Uses of 27 Henry VIII. has not been re-enacted in any considerable number of the American States. In South Carolina,[2] Illinois,[3] and Missouri,[4] it has been adopted with but little, if any, modification. By the Revised Statutes of Delaware it is enacted that the legal estate shall, in all cases, accompany the use, and pass with it.[5] By the New York Revised Statutes it is provided that the party entitled to the possession and receipt of the profits of land, shall be deemed to have the legal estate to the same extent as the equitable interest.[6] A provision of similar import exists in the statutes of Indiana,[7] Michigan,[8] and Wisconsin.[9] In Rhode Island every deed and covenant to stand seized transfers the possession to the *cestui que use* without further ceremony.[10] In all those States which possess statutory enactments of this character, deeds of conveyance made in pursuance thereof operate directly to convey the land to the *cestui que use*, and not merely to raise a use to be afterwards executed by the statute of uses.[11] And it is plain that conveyances thus made may be said, in general terms, to invest the *ces-*

[1] These are the views expressed by Mr. Park on this subject. He remarks, however, that he does not recollect to have met with any authority on the point. Park, Dow. 34.

[2] See Stat. S. C. vol. x. Index, "Uses."

[3] Stat. Ill. (1858,) vol. ii. p. 958, §§ 2, 3.

[4] Stat. Misso. (1845,) p. 218, ch. 32, § 1.

[5] Rev. Stat. 1829, p. 89, § 1.

[6] 2 Rev. Stat. N. Y. 3d ed. p. 13.

[7] Rev. Stat. 1843, ch. 28; 1 Rev. Stat. 1852, p. 503, § 13.

[8] 2 Comp. Laws Mich. (1857,) pp. 824, 825.

[9] Wis. Laws, (1849,) ch. 57, § 3; Laws 1858, ch. 84, § 3.

[10] Rev. Stat. 1844, p. 260, § 11; Rev. Stat. (1857,) p. 335, ch. 146, § 1.

[11] 1 Greenl. Cruise, 340, note.

tui que use with seizin in deed, as well as seizin in law, and, as a consequence, to entitle his wife to dower.[1]

Seizin of incorporeal hereditaments.

30. In respect of incorporeal hereditaments, the general rule is, that the circumstances equivalent to an actual seizin of those hereditaments which lie in livery are not necessary in order to confer a title of dower. Therefore, if the husband purchase a rent, and die before the day of payment, the wife is nevertheless entitled to be endowed.[2] The rule is the same if the rent come to the husband by descent.[3] The following case, from Perkins, exemplifies this general doctrine: "If a rent be granted to a man in fee, and he accepts the grant, and takes a wife, and at the day of payment the tenant of the land tenders the rent to the husband, and he will not receive it, but utterly refuses it, and dies before any receipt of the rent by him, or by any other in his name, or for him, and before anything paid to him in name of seizin of the rent, yet his wife shall have dower of the rent."[4] This conclusion appears to rest upon the principle that by the conveyance to, and acceptance of the grant by the husband, he acquired a seizin in law of the rent.[5] It was said, arguendo, in 2 Siderfin, 110, that "if a rent be granted to A. and his heirs, to commence after the death of B., and the grantee dies before B., yet his wife shall be endowed."[6]

Tortious seizin.

31. A mere naked seizin without right, such as the seizin of a disseisor,[7] an abator, an intruder, a discontinuee,[8] or other person having the freehold and inheritance by wrong, is regarded by

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[1] Upon the subject of Uses in the United States, see, also, 2 Washb. on Real Prop. 142 *et seq.*; see, also, post, ch. 19, § 18.

[2] Park, Dow. 85; Bro. Dow. pl. 35 and 71.

[3] Bro. Dow. pl. 66; fol. 249, b. pl. 5. [4] Sec. 373.

[5] 1 Roper, Husb. and Wife, by Jacob, 354.

[6] See, also, with respect to curtesy in such cases, Co. Litt. 29, a.; Bro. Ten. per le curt. pl. 5; Perk. sec. 469. For a more extended view of the right of dower in rents, see post, ch. 18.

[7] 17 E. 3, 24, admitted by the issue; and see Litt. sec. 448; Countess of Berkshire *v.* Vanlore, Winch, 77; Partington's case, Clayt. 71.

[8] Bro. Discont. de possession, pl. 7; Bro. Dow. pl. 50; Fitz. Dow. 98; Perk. sec. 420; Park, Dow. 87; see post, ch. 17, §§ 20, 21.

the common law as sufficient to enable a right of dower to attach, as against all persons deriving title under such tortious seizin, until it be avoided by the entry or action of the person having the right, or by operation of the law of remitter.[1] Under this doctrine it has been held that if a tenant for years or at will make a feoffment in fee, his wife is entitled to be endowed until the feoffment is defeated, because the tenant, in making the feoffment, virtually becomes a disseizor, and acquires the freehold of the land by disseizin.[2] But as to a lessee for life, the rule is said to be different. The instantaneous seizin which he acquires in making a feoffment in fee, is held not to amount to a disseizin, and to be insufficient to entitle his wife to dower.[3] The ground of this distinction is not very apparent. It would seem, upon principle, that in either case the feoffee would be estopped from denying the seizin of the husband.[4] In the Natura Brevium of Fitzherbert it is laid down as the law, that where a tenant for life makes a feoffment in fee, his wife shall have dower as against the feoffee, but not as against the lessor of her husband.[5]

32. In a Mississippi case, the common law doctrine respecting a tortious seizin was recognized and applied in its full extent. It was there held that a seizin of this description, though maintained by the husband for an instant only, is enough to entitle his wife to dower, as against strangers and those claiming under him.[6] In Pennsylvania, in a case where the husband was seized of certain lands, and, prior to his second marriage, placed his son in possession thereof, but there was no conveyance of the title, and the wife of the second marriage supposed the lands belonged to the estate of her husband; and, after the death of the husband, the son set up a title adverse to his coheirs, and claimed to hold the premises under a parol gift from his father, dower was nevertheless allowed to the widow.[7]

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[1] Bro. Discont. de possession, pl. 7; Bro. Dow. pl. 50; Fitz. Dow. 98; Perk. sec. 420; Park, Dow. 87; see post, ch. 17, §§ 20, 21.

[2] Taylor's case, Sir W. Jones, 317; cited in Hitchcock v. Harrington, 6 John. R. 298; 1 Prest. Abstracts, 355; Tud. Cas. 44.

[3] Bro. Dow. pl. 80; 1 Roll. 676; Jenk. Cent. 3, Ca. 1; Co. Litt. 31, b., note 3.

[4] Park, Dow. 44.

[5] Fitzh. N. B. 150, margin; accord. 1 Roper, Husb. and Wife, by Jacob, 368, 369.

[6] Randolph v. Doss, 8 How. Missis. 205.

[7] Galbraith v. Greene, 13 S. & R. 85.

Joint seizin.

33. The common law also imperatively requires, as a requisite of dower, that the seizin of the husband shall be a *sole* seizin. Upon estates held in joint tenancy no right of dower will attach.[1] This feature of the common law is preserved in 3 and 4 Will. IV., chapter 105.[2] The rule requires that there shall be a sole seizin, both of the freehold and of the inheritance; and if the husband have the freehold and inheritance by successive limitations, and either of these estates be a joint estate, the title of dower will be excluded. So stringently is this rule applied, that where one joint tenant aliens his share, whereby the joint tenancy is severed, and the possibility of survivorship of the other joint tenant is destroyed, it is nevertheless held that the wife of the former shall not be endowed,[3] upon the principle, it is said, that the same act of the husband by which the joint estate is severed, operates to pass the fee of his moiety to the grantee.[4] But it is not necessary that the sole seizin should be of the entirety. A sole seizin of the freehold and inheritance in any particular share or purparty of lands, either as tenant in common, in coparcenary, or otherwise, will, to the extent of that share, confer the right of dower.[5] And any act which severs or determines the joint tenancy, so as to leave a sole seizin in the husband during the coverture, will remove the impediment, and render the wife dowable.[6] But in case of partition between joint tenants, unless made by conveyances to uses,[7] the wife would not be dowable until the partition was executed by entry.[8]

Joint seizin rendered sole by relation.

34. There are cases to be found in the old books, showing that after the death of the husband a joint seizin may, in some instances, become a sole seizin, *by relation*, and the widow consequently be

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[1] Litt. sec. 45; 1 Roll. Abr. 676; Fitzh. N. B. 147, (E.); Cowley *v.* Anderson, Toth. 83. This last case refers to curtesy.

[2] Sec. 2.

[3] Fitzh. N. B. 150; Bro. Dow. pl. 80; Co. Litt. 31, b.; 4 Kent, 37.

[4] Ibid. 1 Roper, Husb. and Wife, 367, (by Jacob.)

[5] Litt. sec. 45; Co. Litt. 37, b.; 1 Roll. Abr. 676; Sutton *v.* Rolfe, 3 Levinz, 84.

[6] Gilb. Uses, 404; Perk. sec. 337; Park, Dow. 40.

[7] See ante, § 27.

[8] Park, Dow. 34.

entitled to dower. These are cases of joint limitations to husband and wife; as if lands be given to husband and wife, and the heirs of the husband, or the heirs of their two bodies, or to their heirs, and the husband die; here the wife, if she do no act, subsequent to the decease of her husband, amounting to an agreement to the joint estate, may waive it, and claim her dower: "For," says Perkins, "she shall not be compelled to take by purchase immediately against her will, and she could not disagree to it before the death of her husband; and the bringing of the writ of dower is a disagreement to take according to the purchase, and that shall relate to the time of the purchase."[1] And Lord Coke remarks that "thereby in judgment of law the husband shall be said sole seized *ab initio*, for otherwise the wife can not be endowed, and yet in truth the husband and wife were joint tenants during all the coverture; but now the refusal shall have such relation, that in judgment of law, the husband was *ab initio* sole seized; and therewith agrees the book in 11 Ed. III., tit. Dow. 63, where the case was, lord and tenant of a house held by homage, and 10*s*. rent. The tenant enfeoffed W.; the lord granted the seigniory to husband and wife in tail; W. attorned, the husband died, the seigniory survived to the wife, and she brought a writ of dower, in bar of which the lord pleaded acceptance of homage, by which it was admitted that the writ of dower did lie."[2]

35. A question is made by Perkins, whether, if the grant be made to the husband and wife *for the life of the husband*, the remainder to the right heirs of the husband, the wife can disagree: "Because," he remarks, "the estate of the wife is determined by the death of the husband." He adds, also, that "it hath been said that a disagreement can not be had to an estate after the estate determined."[3] In the next section, however, he proceeds to answer this objection as follows: "But it seems, in this case, the wife may disagree by bringing a writ of dower, although the estate be determined; for otherwise, by such means, the wife might be ousted of her dower in every purchase made by her husband; and yet during the marriage, she is always by law under the government of the husband, in such manner that she can not give away any manner of profit arising out

[1] Perk. sec. 352.

[2] Butler & Baker's case, 3 Co. 27, b.; see, also, 1 And. 350; Fitzh. N. B. 194, B.; Vin. Abr. Dower, H., pl. 12; Bac. Abr. Joint Tenants, A. It seems that a widow's disclaimer by deed will be sufficient. See Townson *v.* Tickell, 3 Barn. & Ald. 31; 5 Eng. C. L. 219.

[3] Perk. sec. 352.

of the same lands, without his leave; and she can not disagree to the same estate during the marriage."[1]

Transitory seizin.

36. Where the seizin of the husband is for a *transitory* instant only, as where the same act which gives him the estate also conveys it out of him, or where he is the mere conduit employed to pass the title to a third person, no right of dower arises. Perhaps no principle of the law can be said to have become more firmly or thoroughly established than this.[2]

37. Occasional instances of the application of this doctrine may be found in the ancient books of the law. Thus, in the 14 of Henry IV. we find the courts holding that if one joint tenant make a feoffment in fee of his moiety, his wife shall not be endowed of such moiety, for the reason that he had a sole estate but for a transitory instant of time.[3] The same act which gave him a sole estate also conveyed it away from him. And upon this principle it was also adjudged that if a "tenant for life makes a feoffment in fee and dies, the wife shall not have dower, for though the husband gave a fee simple by alienation, yet he was never seized in fee so as she might have dower."[4] So in the 3 Henry IV. it was determined that "if a lessee for life leases for the life of another, his wife shall not be endowed, for he gains this fee in an instant."[5] The same doctrine has been applied in the case of a conuzee of a fine: "If the conuzee of a fine doth grant and render the land to the conuzor, the wife of the conuzee shall not be endowed."[6] A case reported by Croke may also be referred to as furnishing an illustration of this rule. In that case, the husband, who was seized in special tail, made a deed of feoffment to the use of himself for life, and afterwards to the use

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[1] Perk. sec. 353; and see Greening's note to sec. 352, accord.; 1 Roper, Husb. and Wife, by Jacob, 361. For a further discussion of the subject of joint tenancy as connected with the law of dower, see infra, chap. 16, where the American cases are collected and considered.

[2] 2 Bl. Com. 132; 4 Kent, 38; 1 Roper, Husb. and Wife, by Jacob, 374; Park, Dow. 48.

[3] 14 H. 4, 13, b.; 34 E. I. Dow. 179; and see Fitzh. N. B. 150, (K.); Co. Litt. 31, b.; Jenk. Cent. 3, Ca. 1; and vide supra, § 33.

[4] Bro. Dow. pl. 30; 1 Roll. 676; Jenk. Cent. 3, Ca. 1; Co. Litt. 31, b., note 3. See, however, upon this point, ante, § 31.

[5] 3 H. 4, 6.

[6] Lord Cromwell's case, 2 Co. 77.

of his son in tail, and executed a letter of attorney to make delivery. Before livery he took the demandant to wife, and after livery to those uses was made, the husband died, and the question was whether the wife was dowable of the lands. It was adjudged that she was not: That the estate held by the husband before the feoffment was not subject to dower, and the interest acquired by virtue of the feoffment and livery being *eodem instanti* drawn out of him, invested him with no new seizin upon which that right attached. Three cases were there put in which the wife would not be dowable; as where a tenant for life, or a joint tenant makes a feoffment, or where a married man takes a fine, and by the same fine renders the lands to another in tail. It was held that in each of these cases, by reason of the transitory nature of the seizin, there would be no right of dower.[1]

38. Nash *v.* Preston[2] is another old case showing that a transitory seizin is insufficient to give dower; and in the later case of Sneyd *v.* Sneyd,[3] the same principle was recognized by Sir Joseph Jekyll, Master of the Rolls. In that case a question arose whether certain copyhold lands were to be included in an assignment of dower. On behalf of the widow it was insisted that they should be so included, for the reason that the husband had the freehold of the copyhold estates in him as lord of the manor, the manor having been purchased by him, and containing as well copyhold as freehold. It was also claimed that if the husband had granted out the copyhold estates, yet the instantaneous seizin he acquired at the time of the purchase was sufficient to entitle his wife to her dower, and that no after act of his could divest the right which had thus once attached. But the Master of the Rolls did not concur in this view of the law: "Though no cases have been cited on either side," he observed, "and this seems to be a new point, yet I should think that this instantaneous seizin of the freehold of the purchased copyhold estates in the husband, will not entitle the defendant's wife to her dower, for notwithstanding there may be no case of the same nature with this, yet it may be governed by reason and general rules of law; as, for instance, the conuzee of a fine is not so seized as to give his wife a title to

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[1] Ancott *v.* Catherick, Cro. Jac. 615. See opinion per Spencer, Judge, in Stow *v.* Tifft, 15 John. R. 462, 463.

[2] Nash *v.* Preston, Cro. Car. 190.

[3] Sneyd *v.* Sneyd, 1 Atk. 442.

dower; and in the case of a use the widow of a trustee has been determined to have no claim of dower from such a momentary seizin."[1]

Conveyance by deed and simultaneous reconveyance by mortgage; mortgagor has a transitory seizin only.

39. To this principle may also be referred the well-settled doctrine that where a deed for lands is executed, and simultaneously therewith the purchaser gives back a mortgage upon the same lands to secure any portion of the purchase money, he acquires, as against the holder of the mortgage, no such seizin as will entitle his wife to dower. The deed and mortgage, although in themselves separate and distinct instruments, nevertheless, under the circumstances above stated, are regarded as parts of the same contract. They take effect at the same time, and the giving of the deed upon the one part and of the mortgage upon the other, is held to constitute but a single act, and to result in clothing the purchaser with the seizin for a transitory instant only. With but rare exceptions, this is the established doctrine of the American courts.[2]

40. Nor is it necessary that the mortgage should be made directly to the vendor. It is sufficient if it be made to a third person for his benefit.[3] And where the mortgage is of even date with the deed, and both instruments are recorded at the same time, the mortgage, although not made to the vendor, will be presumed to have been

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[1] See, also, Vin. Abr. tit. Dower, (G.,) pl. 5; 2 Vern. 58; Tooker's case, 2 Co. 67.

[2] Holbrook *v.* Finney, 4 Mass. 566; Clark *v.* Munroe, 14 Mass. 351; Coates *v.* Cheever, 1 Cow. 460; Jackson *v.* Dewitt, 6 Cow. 316; Stow *v.* Tifft, 15 John. 458, 463; Bell *v.* Mayor of New York, 10 Paige, 49; Kittle *v.* Van Dyck, 1 Sandf. Ch. 76; S. C. 3 N. Y. Leg. Obs. 126; Cunningham *v.* Knight, 1 Barb. 399; Mills *v.* Van Voorhies, 23 Barb. 125; S. C. 20 N. Y. (6 Smith,) 412; Bullard *v.* Bowers, 10 N. H. 500; Griggs *v.* Smith, 7 Halst. 22; Bogie *v.* Rutledge, 1 Bay, 312; Crafts *v.* Crafts, 2 McCord, 54; McCauley *v.* Grimes, 2 Gill & John. 318; Grant *v.* Dodge, 43 Maine, 489; Whitehead *v.* Middleton, 2 How. Miss. 692; Welch *v.* Buckins, 9 Ohio State R. 331; Gilliam *v.* Moore, 4 Leigh, 30; Nottingham *v.* Calvert, 1 Smith, (Ind.) 399; S. C. 1 Carter, 527; Eslava *v.* Lepretre, 21 Ala. 504; Wheatley *v.* Calhoun, 12 Leigh, 264; Adams *v.* Hill, 9 Fost. N. H. 202; Smith *v.* Stanley, 37 Maine, 11; Young *v.* Tarbell, Ibid. 509; Mayburry *v.* Brien, 15 Pet. 21; Reed *v.* Morrison, 12 S. & R. 18; Rands *v.* Kendall, 15 Ohio R. 671; Sherwood *v.* Vandenburgh, 2 Hill, 303; Hobbs *v.* Harvey, 4 Shepl. 80; Gully *v.* Ray, 18 B. Monr. 107, 114; Garton's Heirs *v.* Bates, 4 B. Mon. 366; Gammon *v.* Freeman, 31 Maine, 243; Moore *v.* Rollins, 45 Maine, 493. This rule is also embodied in the statutes of several of the States. See ch. 23.

[3] Cunningham *v.* Knight, 1 Barb. 399.

executed for the purchase money cotemporaneously with the conveyance, and the right of dower of the wife of the mortgagor will therefore be limited to the equity of redemption.[1] Nor does it make any difference that other premises of the mortgagor are included in the same mortgage as a further security for the purchase money.[2] And where the vendor never had the legal title, but procured his own vendor to make a conveyance to the vendee of the former, and at the same time took from such vendee a mortgage to himself for the purchase money, the same principle applies. Thus, where A. had purchased land from B. by title bond, and after paying for the land, but before receiving a conveyance, sold to C., and by agreement a deed was executed by B. directly to C., and C. at the same time executed a mortgage to A. to secure the purchase money due from C. to A., it was held that the wife of C. was not entitled to dower as against the mortgagee.[3] So where A. had given his note to B. for a tract of land, and by agreement B. conveyed the land to C., who therefor, and at the same time, conveyed another tract of land to A., and A. at the same time gave a mortgage thereon to B. as security for the payment of the note of A., it was held that the momentary seizin of A. did not entitle his wife to dower in the premises thus conveyed to him by C.[4] And if the purchaser make a deed of trust to secure the purchase money, instead of a mortgage, it is equally effectual to exclude the dower of his wife.[5]

41. The rule is the same where a third person advances the consideration money for the lands, and takes from the vendee, to whom they are conveyed by the vendor, a mortgage to secure the repayment of the money thus advanced. It has been determined in the courts of several of the States that in cases of this description, the right of dower of the wife of the vendee is subordinate to the lien of the mortgage.[6]

42. A case was recently determined in Virginia in which the rule now under consideration received a very liberal construction. By

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[1] Cunningham v. Knight, 1 Barb. 399. See Moore v. Rollins, 45 Maine, 493.

[2] Moore v. Rollins, 45 Maine, 493.

[3] Welch v. Buckins, 9 Ohio State Rep. 331.

[4] Gammon v. Freeman, 31 Maine, 243.

[5] Gilliam v. Moore, 4 Leigh, 30; see Moore v. Gilliam, 5 Munf. 346, *dubitanter*.

[6] Kittle v. Van Dyck, 1 Sandf. Ch. R. 76; S. C. 3 N. Y. Leg. Obs. 126; Gammon v. Freeman, 31 Maine, 243; Smith v. Stanley, 37 Maine, 11; Clark v. Munroe, 14 Mass. 351; Mayburry v. Brien, 15 Pet. 21; see Cunningham v. Knight, 1 Barb. 399; 4 Kent, 39; 1 Washb. Real Prop. 176.

the terms of a contract for the sale of land, the vendee was to execute a mortgage to secure the purchase money, immediately upon receiving a conveyance, but by reason of some disagreement as to the terms of the mortgage, its execution was postponed some ten months after the deed was delivered. It was held, however, that in equity the mortgage was to be treated as having been delivered at the time agreed upon, and consequently that the rights of the mortgagee were paramount to the claim of dower.[1]

43. In the case of M'Cauley *v.* Grimes,[2] lands came to certain parties by descent. They agreed by parol that the entire estate of the ancestor should be equally divided among them, and in pursuance of this agreement one of the parties, who had received from the ancestor prior to his death a conveyance for a portion of his estate, reconveyed the same to a coheir, the latter at the same time giving bonds to all the heirs for the payment to each of a certain stipulated sum of money for their respective shares in the lands so conveyed to him, and securing the payment thereof by mortgage upon the same lands. It was held that his widow was not entitled to dower as against the mortgage. And where the husband had acquired a seizin of lands to enable him to mortgage the same, and the wife joined in the mortgage, but failed to acknowledge it, it was decided that she was not dowable of the lands.[3] But where lands had been conveyed subject to a right of repurchase in the grantor, it was held that the transaction did not constitute a mortgage, and that the wife of the grantee was entitled to dower.[4]

44. It is not essential to the application of this rule that the two instruments should correspond in date, provided they are delivered at the same time, as they take effect from the time of delivery only. And it is competent to show by parol at what time the delivery was actually made.[5]

45. The result is the same, so far as the right of dower is concerned, whether the reconveyance by the vendee be in fee, or for life, only. In a case which arose in New Hampshire, a tract of land was conveyed in fee by a father to his son, and the son at the same time reconveyed to the father for the life of the latter. The deed

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[1] Wheatley *v.* Calhoun, 12 Leigh, 264.

[2] M'Cauley *v.* Grimes, 2 Gill and John. 318.

[3] Bogie *v.* Rutledge, 1 Bay, 312.

[4] Chase's case, 1 Bland, 206.

[5] Mayburry *v.* Brien, 15 Pet. 21; Reed *v.* Morrison, 12 S. & R. 18; 1 Washb. Real Prop. 178.

of reconveyance contained a stipulation that the son should not be disturbed in his possession of the premises so long as he performed the conditions of a certain bond executed by him, by which he had undertaken to furnish a maintenance to the father for the period of his natural life. After holding the land for several years, the son left the country, and thenceforth neglected to furnish the stipulated maintenance; whereupon the father entered upon the premises, and continued in possession until his death. The son died during the lifetime of the father, and his widow applied for dower in the land. It was held that although the reconveyance was intended as a security for the performance of the conditions of the bond, it nevertheless did not constitute a mortgage. It was also held that the seizin acquired by the son was not such as would entitle his widow to dower.[1] With regard to this case, it will be observed, that although the reconveyance did not affect the reversion, but left that estate in the son, yet as to the present freehold he had but a transitory seizin. That estate passed from him by the same transaction which conveyed it to him. And as the common law does not give dower in a reversionary interest where there is an outstanding precedent freehold estate,[2] and as the father had entered for breach of the conditions of the bond, while the son was living, and so became seized in fact of the estate for life, it is clear that the decision of the court was strictly in accordance with principle.[3]

46. Cases have been decided in Kentucky which appear to conflict, to some extent, with the general current of authority upon the doctrine above discussed. In one case a purchaser of lands, upon the same day of receiving the conveyance, executed a mortgage of the same lands to the creditors of the vendor, in satisfaction of their demands against the latter. It was held that the dower right of the wife of the purchaser was paramount to the lien of the mortgage.[4] The same ruling was made in a case where a grantee of lands, at the time of receiving the conveyance, reconveyed them to a third person in trust to secure the payment of certain debts due from the grantor.[5]

47. One important element of the rule above considered should here be noticed. In order to deprive the wife of her dower, the

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[1] Moore v. Esty, 5 N. H. 479.

[2] Supra, ch. 11, § 5; Infra, ch. 15.

[3] Park on Dower, 154; Infra, ch. 15.

[4] McClure v. Harris, 12 B. Mon. 261; see, also, Blair v. Thompson, 11 Gratt. 441.

[5] Tevis v. Steele, 4 Mon. 389; Bailey v. Duncan, Ibid. 256; but see Gully v. Ray, 18 B. Mon. 114.

claim of the mortgagee must proceed from the same transaction that gave the husband his seizin. Therefore, where a mortgage was given by the vendee to the vendor, to secure the purchase money of the lands mortgaged, and afterwards a third person discharged the mortgage, and took a new mortgage to himself from the vendee to secure the repayment of the moneys advanced for that purpose, it was held that the wife of the vendee was entitled to dower.[1] And in the same State it was determined that where it is claimed in defence to an action for dower, that a mortgage for the purchase money was executed by the husband simultaneously with the delivery to him of the deed, the *onus* rests upon the defendant of showing that the two instruments constituted but one transaction.[2]

48. A case recently decided in New Hampshire, by reason of its peculiar character, is deserving of especial notice. Certain lands in Lancaster were conveyed by A. to B., on the 2d of June, 1821. On the 9th of the same month, C. conveyed to B. certain other lands in Greenland, and B. immediately executed to A. a mortgage upon the lands in Greenland, to secure the purchase money of the lands in Lancaster. The court, acting upon the idea that here was but a transitory seizin of the premises situate in Greenland, refused to allow the widow of the vendee to be endowed thereof, except upon condition that she contributed to the satisfaction of the mortgage debt.[3] The correctness of this decision has been questioned, and with apparent reason.[4] If the right to be endowed is to be tested by the simple question whether the seizin is transitory only, without reference to the character of the interest actually acquired by the husband, the ruling of the court was undoubtedly correct. But it is believed that this is not the true test to be applied. If the husband mortgage lands of which he is seized, to a third person, to secure a debt which does not originate from, and has no connection with, the purchase of the lands, the general rule is that the wife is not affected by the mortgage; and the fact that the mortgage is executed immediately after the seizin has attached, will not, it is apprehended, make any material difference in the case. In Maine the question has been decided directly to the contrary of the ruling of the New Hampshire court. A husband, at the same time that he

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[1] Gage *v.* Ward, 25 Maine, 101.
[2] Grant *v.* Dodge, 43 Maine, 489.
[3] Adams *v.* Hill, 9 Fost. N. H. 202; and see Gammon *v.* Freeman, 31 Maine, 243.
[4] 1 Washb. Real Prop. 176, note.

received a deed for lands, conveyed them by deed to a third person, and it was determined that inasmuch as he had been seized beneficially, although for an instant only, the wife should have her dower,[1] and this holding would seem to be in accordance with correct principle, and the general tenor of the authorities.

Instantaneous seizin.

49. Subject to the qualifications and exceptions set forth in the foregoing division of this chapter, the rule of the common law is, that a beneficial seizin by the husband, for a single instant of time, is sufficient to clothe the wife with the right of dower.[2] Instances of the application of this rule have been noticed on a previous page; as where lands descend upon the husband during the coverture, and a stranger abates upon them in the instant of the ancestor's death;[3] or where the husband is seized of a remainder or reversion expectant upon an estate of freehold, and the latter estate determines during the coverture by the expiration of the time comprised in its limitation, and a stranger immediately intrudes upon his seizin.[4] In either of these cases the instantaneous seizin is sufficient to enable the estate of dower to attach. This principle is further illustrated by the old and often quoted case of Broughton *v.* Randall,[5] which arose in Wales. In that case a father was tenant for life, remainder to his son in tail, remainder to the right heirs of the father. Both father and son were attainted of felony, and executed at the same time, being both hanged in one cart. The son had no issue of his body. It was proved by witnesses who were present at the execution that the father moved his feet after the death of the son, and, upon this evidence, it was found by verdict that the father died seized of an estate in fee by survivorship, of which his wife had a right to be endowed, and she had judgment accordingly.[6] The common law rule that instantaneous seizin, accompanied by a beneficial interest

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[1] Stanwood *v.* Dunning, 2 Shep. 290; see Tevis *v.* Steele, 4 Mon. 339.

[2] Co. Litt. 31, a.; 2 Bl. Com. 132; 1 Roper, Husb. and Wife, by Jacob, 373; 4 Kent, 39.

[3] Ante, § 24. [4] Ante, § 25.

[5] Broughton *v.* Randall, Noy, 64; Cro. Eliz. 502. In the latter book the facts are somewhat differently stated. See 2 Bl. Com. 132.

[6] With respect to questions of survivorship between persons perishing by the same calamity, see Taylor *v.* Diplack, 2 Phill. 261; 1 Greenl. Ev. §§ 29, 30.

in the husband, is sufficient to confer dower, is very generally recognized in the United States.[1]

[1] Holbrook *v.* Finney, 4 Mass. 566; Coates *v.* Cheever, 4 Cowen, 460; Griggs *v.* Smith, 7 Halst. 22; Stanwood *v.* Dunning, 2 Shepl. 290; Randolph *v.* Doss, 8 How. Miss. 205; Crafts *v.* Crafts, 2 McCord, 54; Douglass *v.* Dickson, 11 Rich. Law R. 417; Arrant *v.* Robertson, 2 McMullan, 215; Tevis *v.* Steele, 4 Monr. 339; McClure *v.* Harris, 12 B. Monr. 266; 4 Kent, 38, 39; 1 Washb. Real Prop. 175; 1 Hilliard, Real Prop. 2d ed. 186.

CHAPTER XIII.

DOWER IN ESTATES IN FEE SIMPLE, FEE TAIL, AND ESTATES ACQUIRED BY EXCHANGE.

§ 1. Dower in estates in fee simple.
2–6. In estates in fee tail.
7–11. In estates acquired by exchange.
§ 12–14. Effect of the determination of estates by natural limitation.

Estates in fee simple.

1. An absolute and unconditional estate in fee simple is the highest interest in lands known to the law. It is hardly necessary to add that such an estate is subject to dower.

Estates in fee tail.

2. A widow is also entitled to dower in estates in fee tail, whether general or special, except where the estate is so limited as to exclude her issue from the inheritance. This point has been already sufficiently explained elsewhere.[1]

3. In many of the United States the common law relating to entailments is entirely abolished, and in others it is very materially modified. Some of these changes will be here noted. In California,[2] Florida,[3] Texas,[4] and Virginia,[5] the entailment of estates is expressly forbidden. In Alabama,[6] Georgia,[7] Kentucky,[8] North Carolina,[9] Tennessee,[10] and Wisconsin,[11] the statute regulations convert estates tail into estates in fee simple in the hands of the first donee in tail. In Indiana the law is the same, except where a valid remainder is limited

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[1] Ante, ch. 11, § 2.
[2] Const. Art. XI. § 16.
[3] Thompson's Dig. 2d Div. tit. 2, ch. 1, § 4.
[4] Const. Art. I. § 18.
[5] Act of Va. 7th Oct. 1776; 4 Kent, 14.
[6] Code, 1852, § 1300.
[7] Cobb's Laws, 1851, pp. 167, 282.
[8] Rev. Stat. 1851–2, ch. 80, § 8; 2 Rev. Stat. by Stanton, ch. 80, § 8.
[9] Code, 1854, ch. 43, § 1.
[10] Code Tenn. (1858,) Art. I. § 2007.
[11] Rev. Stat. 1849, ch. 56, § 8; Rev. Stat. 1858, ch. 83, § 8.

upon what is, in form, an estate tail, in which case the remainder is allowed to take effect.[1] The statute of Michigan is, in this respect, almost identical with that of Indiana.[2] And, in New York, if no valid remainder be limited on an estate tail, the tenant in tail takes a fee simple absolute.[3] Estates tail are prohibited in Mississippi, and they are declared to be estates in fee simple, except that lands may be limited to a succession of donees then living, not exceeding two, and to the heirs of the body of the remainder-man, and, in default thereof, to the heirs of the donor in fee simple.[4] In Iowa, all limitations which suspend the absolute power of alienation longer than lives in being, and twenty-one years, are void.[5] In Massachusetts,[6] Maine,[7] New Hampshire,[8] and Maryland,[9] tenants in tail may convey in fee simple, and in the last-named State estates in fee tail general will descend like estates in fee simple. In Pennsylvania estates tail may be barred by deed expressing an intent so to do.[10] And in Rhode Island a tenant in tail may bar the estate by limiting a fee simple to his grantee or devisee, the deed in such case to be acknowledged before the Supreme Court or Court of Common Pleas.[11]

4. In the following States the first donee in tail takes an estate for life only. Arkansas: and the statute of this State gives the remainder in fee simple to the person to whom, at common law, the estate would first descend.[12] Connecticut: In this State the issue of the first donee in tail takes an absolute fee simple.[13] Illinois: The statute of this State is substantially like that of Arkansas.[14] Missouri: Estate for life in tenant in tail, and remainder in fee to his

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[1] Rev. Stat. 1852, vol. i. 238.

[2] Rev. Stat. 1846, ch. 62, § 3; 2 Comp. Laws, 1857, p. 818, ch. 85, §§ 3, 4.

[3] 1 N. Y. Rev. Stat. 722, § 3; see Van Rensselaer *v.* Kearney, 11 How. U. S. Rep. 297.

[4] Rev. Code, 1857, ch. 86, § 1, Art. 3.

[5] Rev. Code, 1851, § 1191; Rev. of 1860, p. 388, § 2199.

[6] Rev. Stat. 1836, ch. 59, § 3; Gen. Stat. Mass. (1860,) ch. 89, § 4; see Wright *v.* Thayer, 1 Gray, 284; Holland *v.* Cruft, 3 Gray, 162.

[7] Rev. Stat. 1857, ch. 78, § 4.

[8] Comp. Stat. 1853, ch. 135, § 1.

[9] 1 Maryl. Code, Art. 24, § 24; Ibid. Art. 47, § 1; see Art. 93, § 298; Chelton *v.* Henderson, 9 Gill, 438.

[10] Dunlop's Laws, p. 206; Purdon's Dig. 358.

[11] Rev. Stat. 1857, ch. 154, §§ 1, 2.

[12] Rev. Stat. 1848, ch. 37, § 5; Dig. Stat. Ark. (1858,) ch. 37, § 5.

[13] Comp. Stat. 1854, p. 630, § 4.

[14] Rev. Stat. 1855, ch. 15, § 6; Stat. Ill. (1858,) vol. ii. p. 960.

children as tenants in common.[1] New Jersey[2] and Ohio:[3] In these States the first donee takes a life estate; the fee simple vests in his heirs absolutely. In Vermont the first taker has an estate for life, with remainder in fee simple absolute to the person or persons to whom the estate would pass on his death.[4]

Where, as in the States above enumerated, the estate of the first donee in tail is converted into a mere life estate, and is thus shorn of its inheritable quality in his hands, his widow, for reasons that will be hereafter stated, will not be dowable of the premises.[5] This point has been expressly determined in Missouri;[6] and in Connecticut, where a tenant in tail general conveyed the lands in fee simple, taking back an estate for the term of his own life, covenanting not to commit waste, and after his death the issue in tail entered, it was held that after the conveyance in fee by the tenant in tail, no estate remained in him of which his widow could be endowed.[7]

5. In South Carolina the statute *de donis* was never in force, and in that State it is held that *conditional* estates in fee simple remain as at common law before the passage of that statute.[8] The creation of a fee simple conditional, vests the estate in the tenant in fee. If he have issue, the condition of the grant is performed, and the estate becomes absolute in him, so as to enable him to convey it in fee simple. If he fail to have issue, his interest becomes a mere life estate, and, upon his death, the lands revert to the original donor. But the possibility of a reverter thus existing in the donor, is held not to be an *estate;* neither is it the subject of inheritance nor devise.[9]

6. In Maryland a question was made as to whether a title of dower arose in the following case: A testator devised his real property as

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[1] Rev. Stat. 1845, ch. 82, § 5. [2] Nixon's Dig. p. 196, § 11.

[3] Rev. Stat. 1854, ch. 42, § 1; 1 Swan & Critch. 550.

[4] Comp. Stat. 1850, ch. 62, § 1; see Const. Verm. part 2, § 36.

[5] Post, ch. 17. But in New Jersey, by express statute, the widow of the first donee in tail may have dower in the estate. Nixon's Dig. p. 196, § 11.

[6] Burris *v.* Page, 12 Mo. 358.

[7] Whiting *v.* Whiting, 4 Conn. 179.

[8] Stat. vol. iii. p. 341; Murrell *v.* Matthews, 2 Bay, 397; Carr *v.* Porter, 1 McCord's Ch. R. 81; Henry *v.* Felder, 2 Ibid. 324, 326, 328, 337; Bedon *v.* Bedon, 2 Bailey, 281; 4 Kent, 17.

[9] Ibid. Adams *v.* Chaplin, 1 Hill's S. C. Ch. R. 276. The reverter consequent upon the death of the issue without issue, during the lifetime of the husband, does not defeat dower. Paine's case, 8 Co. 34, b.; see post, ch. 14, §§ 16, 17.

follows: "Unto my wife, E. C., all my lands during her life, and after the death of my said wife, I give all the said lands to my son R. and my daughters Ann, A. E. and Agnes, to have and to hold the same during their single lives: And in case my said children here mentioned should marry, or my son R. should die without lawful issue, then and in that case, it is my desire that my son W. have and enjoy the whole of my said lands, to him, his heirs and assigns forever." It was held that the son R. took an estate in fee tail; and that, as the statute of Maryland makes such an estate a fee simple, his wife was entitled to dower therein.[1]

Estates acquired by exchange.

7. The term "exchange," when employed in its technical sense, and with reference to the law of real property, implies a mutual grant of equal interests, the one in consideration of the other. It is not essential that the estates exchanged should be of equal *value*, but it is requisite that they should be of equal *interest*, as a fee simple for a fee simple; a lease for life for a lease for life, and the like.[2] With regard to the right of dower in estates thus acquired, the common law is somewhat peculiar.

8. Where a valid exchange of lands is made, and the title is consummated by entry,[3] the widow of either of the parties to the exchange may, by the common law, exercise the right of election as to which estate she will be endowed of, whether that given, or that received in exchange by her husband; but she can not have dower in both, although the husband had seizin of both during the coverture.[4]

9. Upon an exchange of lands the law implies a special warranty of title; and if an exchange be made between A. and B., and B. marry, and afterwards A. is evicted of the land taken in exchange, he may recover in value against B. the land given in exchange, and the wife of B. will thereby lose her dower, for, according to the old books, the recovery in value is paramount to the title of dower, by

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[1] Chew *v.* Chew, 1 Md. 163.

[2] 2 Bl. Com. 323.

[3] Upon the subject of entry in such cases, see ante, ch. 12, §§ 15, 27.

[4] Co. Litt. 31, b.; Perk. sec. 319; Fitzh. N. B. 149, (N.); Butler & Baker's case, 3 Leon. 271; Park, Dow. 261; 1 Washb. Real Prop. 158, § 11; 1 Greenl. Cruise, 163, § 12; 1 Hilliard, Real Prop. 149, § 8.

relation to the time of the exchange, which was before the marriage.[1] But if a man recover by way of *recompense in value*, against the husband, by a *warranty ancestrel*, the wife shall be endowed, because the recovery there is simply by force of the warranty, and not by reason of any elder title to the land, and so the land is bound only from the time of the judgment. The warranty here is only a collateral charge, and not a specific lien upon the land, as in the case of exchange or partition.[2]

10. The doctrine of the common law with respect to exchanges of real property, is not universally adopted in the United States. The rule in a majority of the States is that this mode of dealing in lands stands upon the same footing as transfers in the usual form. Both parties are regarded as ordinary purchasers, and the right of dower of the wife of each attaches, as well upon the parcel conveyed as upon that received in exchange. This point was determined in New Hampshire, in a case where an agreement for the exchange of lands was executed by mutual conveyances in the ordinary form, and it was held that the wives of the respective parties might claim dower in both parcels.[3] In Maine it was held, upon the principle applicable to the partition of lands, that where two tenants in common divide their estate by executing mutual releases, the wife of one of them shall not be endowed of both parcels, her right of dower attaching only upon the share of the husband.[4] But if the division be made in unequal parts, one tenant paying the difference in value to the other, the transaction is then regarded in the light of an ordinary sale of lands, and the widow of the tenant receiving a release of the larger proportion may not only claim dower in that proportion, but also in the share released to the cotenant by her husband.[5]

11. In New York,[6] Wisconsin,[7] Arkansas,[8] Michigan,[9] Illinois,[10]

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[1] 2 Roll. Vouch. (R. b.) pl. 4; Perk. sec. 309.

[2] Park, Dow. 153; Fitzh. N. B. 150, (D.); Gilb. Uses, 399.

[3] Cass *v.* Thompson, 1 N. H. 65. The court held, however, that mutual conveyances, in the ordinary form, do not constitute an exchange proper; that the word *exchange* is absolutely essential to that mode of conveyance. This term was omitted in both deeds in the case decided by the court.

[4] Mosher *v.* Mosher, 32 Maine, 412.

[5] Ibid.

[6] 1 Rev. Stat. 740.

[7] Rev. Stat. Wis. (1858,) p. 545, ch. 89, § 2.

[8] Dig. Ark. Stat. (1858,) p. 451, ch. 60, § 3.

[9] 2 Comp. Laws Mich. 841, ch. 89, § 2.

[10] Stat. Ill. (1858,) vol. i. ch. 34, § 16.

Minnesota,[1] Oregon,[2] and the District of Columbia,[3] the right of dower is limited, upon the exchange of lands, as at common law. And in Kentucky the same doctrine is applied in practice by the courts.[4] The statutes upon this subject usually require the widow to elect, within a specified time, of which parcel she will be endowed, and if she fail to make such election, she is to be deemed to have elected to take her dower in the lands received in exchange. In order, however, to make a case of exchange within the meaning of these statutes, the *interests* mutually transferred must be equal; otherwise the right of dower will attach as in ordinary cases of sale and conveyance.[5]

Estates determined by natural limitation.

12. As a general rule, the determination of an estate which, in its nature, is subject to dower, by its regular and natural limitation, will not affect the claim to endowment. To such an estate dower is a necessary incident; it is annexed thereto by implication of law, and forms a part thereof. In other words, the estate of the wife is regarded as a mere prolongation of the estate of the husband.[6] If, therefore, the husband be seized of an estate in fee simple, and die without heirs, his widow shall have her dower, notwithstanding the escheat arising by reason of such failure.[7] The same principle applies to estates tail. Thus, in Paine's case, it was held by the court "that at the common law, if lands had been given to a woman and to the heirs of her body, and she had taken a husband and had issue, and the issue died, and the wife also, without issue, whereby the inheritance of the land did revert to the donor, in that case the estate of the wife is determined, and yet the husband shall be tenant by the curtesy, for that is *tacité* implied in the gift."[8] It was also determined

[1] Stat. Minn. Rev. 1858, p. 407, § 2.

[2] Stat. of Oregon, (1855,) p. 405, § 2.

[3] Rev. Code Dist. Col. (1857,) p. 200, § 7.

[4] Stevens *v.* Smith, 4 J. J. Marsh. 64; Mahoney *v.* Young, 8 Dana, 588.

[5] Wilcox *v.* Randall, 7 Barb. 633; 1 Washb. R. P. 158, § 11.

[6] Park, Dow. 157; Tud. Cas. 44; 1 Washb. R. P. 212, § 31; Northcutt *v.* Whipp, 12 B. Monr. 73; Lawrence *v.* Brown, 5 N. Y. (1 Seld.) 394; Fowler *v.* Griffin, 3 Sand. S. C. 385.

[7] Bracton, 297, pl. 2; Bro. Tenures, pl. 33; Park, Dow. 158; 4 Kent, 49. This principle has no application to cases of escheat at common law by reason of *crime*. The case of the determination of a *rent* in fee is considered, post, ch. 18.

[8] Paine's case, 8 Co. 34, b.

that the same doctrine applied to estates tail since the statute *de donis*, the title of the husband to be tenant by the curtesy, and of the wife to be tenant in dower, not being restrained by that statute. The judgment of the court, as reported by Coke, is as follows: "And if tenant in tail takes a husband, and hath issue and dies, now the husband is tenant by the curtesy; and although afterwards the issue dies without issue, so that the estate tail is determined, yet his estate shall continue, for it is not derived merely out of the estate of the wife, but is created by the law, by privilege and benefit of law *tacité* annexed to the gift." In conformity to the same principle, the continuance of the estate of the dowress is elsewhere designated by Lord Coke as "*quodammodo* a continuance of part of the estate tail."[1] Perkins states the point thus: "If a donee of land in tail general take a wife, and dies without issue, and the donor enters, the wife of the donee shall have dower; and yet the estate tail which made her title is determined."[2]

13. So strict is the common law in the enforcement of this rule, that it will not permit the right of dower to be affected or impaired by any condition or qualification contained in the conveyance of the estate to the husband. The continuation of the estate of the husband in the widow is so far considered by the law a portion of the quantity of enjoyment designated by the terms of the limitation of the estate, that any attempt to limit or restrain the right of the wife is regarded as being repugnant to the grant. This point was discussed in Sir Anthony Mildmay's case,[3] and it was there said by the court, that "if a man makes a gift in tail on condition that the donee shall not commit waste, or that his wife shall not be endowed, or that the husband of a woman, tenant in tail after issue, shall not be tenant by the curtesy, or that tenant in tail shall not suffer a common recovery,—these conditions are repugnant, and against law, because, by the gift in tail, he tacitly enables him to commit waste, that his wife shall be endowed, and to suffer a common recovery. And therefore it is repugnant to restrain it by con-

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[1] Earl of Bedford's case, 7 Co. 67, 68, 9, a.; see Litt. sec. 53; Co. Litt. 31, b., 241, a., and note 4; Perk. sec. 317; Fitzh. N. B. 149, G.; Bro. Dow. pl. 86; Park, Dow. 158, 159; 4 Kent, 49; 1 Washb. Real Prop. 212, § 31; 2 Crabb, Real Prop. 166. This point is also decided in Smith's Appeal, 23 Pa. St. R. 9.

[2] Perk. sec. 317. As to *rents* in fee tail, see post, ch. 18, §§ 1–8.

[3] Sir Anthony Mildmay's case, 6 Co. 41, a.; and see Dyer, 343, b.; The Earl of Arundel's case, Shep. Touch. by Preston, 128, 131; Co. Litt. 224, a.

dition, for that would be to give a power, and to restrain the same power in one and the same deed."[1]

In England this rule of the common law is now changed by statute. The late dower act contains the following provision: "And be it further enacted, That a widow shall not be entitled to dower out of any land of her husband, when, in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land."[2]

14. As a consequence of the prolongation of the estate for the benefit of the dowress, under the doctrine of the common law, it follows that all charges or derivative interests created by the tenant in tail *prior* to the inception of the title of dower, although void as against the reversioner or remainder-man, will be revived as against the dowress in proportion to the part set off to her in dower. This is illustrated in a case put by Coke: "If tenant in tail make a lease for years, reserving 20*s*., and after take a wife and die without issue, now as to him in the reversion the lease is merely void; but if he endow the wife of tenant in tail of the land, (as she may be though the estate tail be determined,) now is the lease as to the tenant in dower (who is in of the state of her husband) revived again as against her, for as to her the estate tail continueth; for she shall be attendant for the third part of the rent services, and yet they were extinct by act in law."[3]

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[1] Park, Dow. 82.

[2] 3 & 4 Will. IV. ch. 105, § 6. See Appendix.

[3] Co. Litt. 46, a.; Earl of Bedford's case, 7 Co. 67, 9, a.; 1 Roll. Abr. 842; Park, Dow. 162.

CHAPTER XIV.

DOWER IN DETERMINABLE ESTATES.

§ 1. The maxim *cessante statu primitivo cessat derivativus.*
2. Dower in defeasible estates.
3–5. In estates upon condition.
6–8. In base and qualified fees.
9–12. In estates determinable under power of appointment.
§ 13, 14. In estates determinable under collateral limitations.
15–38. In estates determinable under conditional limitations, or by executory devise.

1. *Cessante statu primitivo cessat derivativus*, is a maxim in the law, and upon this maxim is founded the rule that the dower estate of the wife can only be commensurate with the primitive estate from which it is derived. We have just seen that the determination of an estate in fee simple or fee tail, by its natural or regular limitation, does not defeat the right of dower. It has also been shown that this result is not attributable to any exception to the foregoing rule, as is sometimes supposed, but is in harmony with it. The dower estate of the widow, in such cases, exists by implication of law as a part of the estate embraced in the original limitation to the husband. The quantum of enjoyment designated in the grant is held not to be exhausted until after the death of the widow. So long as there are heirs—where the estate is limited in fee simple; or issue, where it is limited in fee tail—the *entire* estate continues to exist. So long as there is a dowress, the estate has a *partial* continuation.[1] There are cases of limitation by way of shifting use, and executory devise, to which this doctrine is also supposed to apply, but in respect of which, differences of opinion exist, as will be explained hereafter.[2] As regards ordinary determinable estates, however, the maxim above quoted, and the rule founded thereon, are of general, if not universal application. Subject to the qualification above stated, the general doctrine is, that if the estate of the husband be, in its own na-

[1] Park, Dow. 183–5.

[2] Post, § 15 *et seq.*

ture, an estate of inheritance, the fact that it has a determinable quality attached to it will not prevent the inception of a title of dower; but when that estate, by reason of its determinable quality, is avoided or defeated, the right of dower falls with it.

Defeasible estates.

2. Defeasible estates—having reference now to such estates as are acquired by a tortious entry, or other equivalent act of disseizin—are, as already shown, subject to dower.[1] But dower being an interest annexed to the defeasible estate, it follows that it is avoided upon the restoration of the seizin to the rightful owner under his prior title.[2] In these cases the seizin of the owner is not merely determined, but it is defeated, or, as the old books still more expressively term it, is *disaffirmed*. The restoration of the original seizin is considered as not merely a giving back to the owner of that which had been unjustly taken from him, with all the prejudice of an intermediate ownership, but, in intendment of law, it is considered as purging and abolishing the intermediate seizin, and all its consequences, and, for the purposes of title, negativing the existence of such seizin. The person having the right is not merely restored to his right, but he is placed in *statu quo*.[3] Therefore, if the owner of an estate be disseized, and the disseizor marry, and afterwards the disseizee enter upon, or recover against the disseizor, the title of dower in the wife of the disseizor is thereby defeated.[4] And if the disseizor die seized, and his heir actually endow the widow, and the disseizee afterwards recover the lands by judgment against the heir and dowress, the estate of the dowress is at an end.[5]

Estates upon condition.

3. Care must be exercised not to confound estates upon condition with estates created under conditional limitations. The former can only be defeated by entry for condition broken,[6] and, when this is

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[1] Ante, ch. 12, §§ 81, 82.

[2] Gilb. Uses, 899.

[3] See Litt. sec. 358; 1 Roll. Abr. 474.

[4] Countess of Berkshire *v.* Vaulore, Winch, 77.

[5] Park, Dow. 141, 142; Co. Litt. 420, b.; Dyer, 41, a.; Tud. Cas. 44; 2 Crabb, Real Prop. 165.

[6] See ch. 12, § 14.

done, the old paramount title is reassumed. In the latter, upon the happening of the event or condition which is to terminate the estate, it *ipso facto* ceases, and, by the terms of the grant or devise, shifts to another person.[1]

4. An estate held upon condition, so long as it is not avoided by entry for forfeiture, is subject to dower;[2] but when the estate is determined by such entry, the right of dower which depends upon it is also determined. Thus, if an estate be granted in fee or in tail upon condition to be performed by the *grantee*, and the grantor enter for breach of the condition; or if the grant be upon condition to be performed by the *grantor*, and he duly perform the condition, and enter, the wife of the grantee is not entitled to dower.[3] And if a portion only of the estate of the husband be defeated by force of the condition, as where the condition is annexed to the freehold only, yet as the operation of that condition deprives the estate of that quality which renders it subject to dower, and converts it into an estate in remainder or reversion, the title of dower is equally avoided—the former seizin being disaffirmed by entry for the breach—as where the whole estate is defeated. To this principle may be referred the case already put of a surrender upon condition, by the lessee for life to the reversioner, by force of which the wife of the reversioner becomes dowable, but where, if the lessee enter for condition broken, the estate of dower is defeated.[4]

5. A case was recently determined, in New York, involving the application of this principle. A tenant for life executed a lease for the term of her own life, to the reversioner, upon condition that the rent should be paid according to the terms of the lease. The lessee failed to perform this condition, and the lessor thereupon entered for the breach. The reversioner having died during the lifetime of the tenant for life, it was held that the forfeiture of the lease and subsequent re-entry for condition broken, operated to defeat his freehold

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[1] 4 Kent, 32, 33, note; 1 Washb. Real Prop. 212, § 32; 1 Hilliard, Real Prop. 114, § 24. As to dower in estates created by way of conditional limitation, or executory devise, see infra, §§ 15–38.

[2] Ch. 12, § 14.

[3] Park, Dow. 154; 1 Roll. Abr. 474; Perk. secs. 311, 312; Ley, 299, arg.; Butler's note, 4, Co. Litt. 241, a.; 4 Kent, 49; 1 Washb. Real Prop. 208, § 26; Beardslee *v.* Beardslee, 5 Barb. 324.

[4] Ante, ch. 11, § 14; Park, Dow. 154.

estate *ab initio*, and consequently that his widow was not dowable of the lands.[1]

Base and qualified fees.

6. A base fee, carved out of an estate tail,[2] or a qualified fee, as the Duchy of Cornwall,[3] will confer a right of dower as against all persons claiming those estates.

It was for a long time the opinion of eminent lawyers, that under alienations by tenant in tail, not creating a discontinuance, nor operating as a bar, namely, by grant, bargain and sale, or other *innocent* conveyance, the alienee had a mere descendible freehold, simply determinable with the death of the tenant in tail. This opinion is supposed to have been founded on several passages of Littleton, in the chapter on Discontinuances,[4] where, speaking of such conveyances in opposition to tortious alienations, which, as they can only be avoided by the *action* of the issue or remainder-man, are therefore indefeasible till so avoided, he treats them as conveyances passing an estate determinable upon the death of the tenant in tail; meaning nothing more, probably, than that the mere entry of the issue when their title accrued, without anything further, avoids them. In *The Case of Fines*,[5] (determined in the 44th of Elizabeth,) a correct exposition was put upon the text of Littleton, and it was there said, that "his intent was not that the grantee had but an estate for life, and that his estate should be absolutely determined by the death of tenant in tail, but that it was not a discontinuance; nor had the grantee any fixed or durable estate, but for the life of tenant in tail; but that the issue after his death might at his pleasure de-

[1] Beardslee *v.* Beardslee, 5 Barb. 324; see, also, Moore *v.* Esty, 5 N. H. 479; ante, ch. 11, § 14. Mr. Hilliard states the rule differently: "If the life estate cease for a time, though afterwards reinstated, the widow of the reversioner has dower on account of the temporary seizin. Thus, if lessee for life surrender to the reversioner on condition, and enter for condition broken, the widow of the latter shall be endowed." 1 Hilliard, Real Prop. 2d ed. 133, § 43. This exhibition of the law does not appear to be supported by the authorities. In addition to the cases above referred to, see authorities cited in notes to §§ 2, 3, and 4 of this chapter.

[2] The Case of Fines, 3 Co. 84, b.; Seymor's case, 10 Co. 96, a.; Co. Litt. 241, a., n. 4; Jenk. 274, pl. 96; Machell *v.* Clarke, 2 Raym. 778; 1 Cruise, 162, § 6; 1 Jarman on Wills, 792; 4 Dane's Abr. 668; 1 Washb. Real Prop. 175, § 7; Jackson *v.* Kip, 3 Halst. 241; see Whiting *v.* Whiting, 4 Conn. 179.

[3] Jenk. 280, pl. 5; Park, Dow. 50.

[4] Litt. secs. 598, 600, 606–608.

[5] The Case of Fines, 3 Co. 84.

termine it; and if the grantee in such case should have but an estate for life of tenant in tail, then the wife of such grantee should not be endowed; against which it was adjudged in 24 E. III. 28, b."[1] In Seymor's case[2] the nature of the estate of an alienee of tenant in tail was also fully considered, and by the first resolution of the judges the wife was held dowable of that estate. But, from some cause, the report of Lord Coke left the question in a very unsatisfactory condition, for the inference from the resolution that the bargainee had an estate of *inheritance*, is, in a great measure, negatived by the language of the report, which represents the court throughout as treating the estate, so far as it was dependent upon the bargain and sale, as a mere descendible freehold, determinable on the death of the tenant in tail, and expressly taking the distinction between a descendible freehold under the bargain and sale, and a base fee under the subsequent fine to the use of the bargainee. This inconsistency occasioned subsequent judges to hesitate in admitting Seymor's case as an authority on the question of dower. Chief Justice Vaughan, in particular, in an anonymous case,[3] in which it was held that the bargainee of a tenant in tail had a mere descendible freehold, asks, "How is it possible that such a tenant, who by the very book in the tenth report Seymor's case, hath but a descendible freehold, how comes he to be so distinguished from other tenants that his wife shall be endowed?" "I can not see how she can. There is no reason to difference it from other estates of freehold, determinable upon other acts and accidents, so long as Paul's steeple shall stand." The interpretation put upon the text of Littleton, in *The Case of Fines*, was again overlooked in Took *v.* Glascock,[4] in which it was held, that by the bargain and sale of a tenant in tail, nothing passes but an estate descendible for the life of the bargainor. But the law was finally settled in Machell *v.* Clarke,[5] where, after solemn argument, it was adjudged that the bargainee has a base or determinable fee, and that his estate continues until it is avoided by the entry of the issue in tail. The authority of Seymor's case was ad-

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[1] See, also, Fitzh. Dow. 98.

[2] Seymor's case, 10 Co. 95; S. C. 1 Bulstr. 168, by name of Heywood *v.* Smith.

[3] Anon. S. Carter, 210.

[4] Took *v.* Glascock, 1 Saund. 260.

[5] Machell *v.* Clarke, 2 Raym. 778; 2 Salk. 619; 7 Mod. 18; 11 Mod. 19; 1 Comyn, 119.

mitted as to the point of dower, and the decision in Took *v.* Glascock was denied to be law.[1]

7. But the dower estate of the wife of a bargainee or releasee of a tenant in tail is defeated by the entry of the issue after the death of the tenant in tail; the effect of such entry being to determine the estate of the husband, as shown in the preceding section.[2] Margery Cally's case[3] has been criticised as being inconsistent with this doctrine,[4] but, it would seem, without just reason.[5]

8. The following decision was made in New Jersey: A testator, by his will, devised his property as follows: "I give to my son J. all my lands where I now dwell, unto him, his heirs and assigns forever; though on this proviso:—if he shall again become *compos mentis*, and of sound mind and understanding, and capable of taking care of a family; or should obtain lawful issue, who shall be *compos mentis;* but for want of that, then my son A. shall have all the lands devised to my son J., to him the said A. and his heirs." J. remained *non compos* during his lifetime, and, on the testator's decease, A. took possession of the premises, and died seized in the lifetime of J. It was held that A. took such an inheritance under this devise as entitled his widow to dower in the premises.[6]

Estates determinable under power of appointment.

9. Among the methods invented by the early English conveyancers to so transfer real property as to intercept the title of dower, and enable the purchaser to dispose of it at will free from that incumbrance, was the mode of conveying the estate to such uses as the purchaser should, by deed or will executed in a particular manner, direct or appoint, and, in default of appointment, to the purchaser, his heirs and assigns. This mode of limiting the estate proceeded upon the assumption that the exercise of the power of appointment defeated the estate limited in default of its execution. Questions, however, speedily arose with regard to the effect of such a limitation. At one time it was doubted whether the power did not merge in the fee; but it was finally settled that it did not. Then it was claimed that estates limited in default of the execution of such a power were *vested*, subject to a liability to be divested by an exercise of the

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[1] Park, Dow. 50–8.
[2] 24 E. III. 28, b.
[3] Seymor's case, 10 Co. 96, a., 98, a.
[4] Note by Serj. Williams, 1 Saund. 261, a.
[5] Park, Dow. 142, 148, and note.
[6] Jackson *v.* Kip, 3 Halst. 241.

power, and the law was eventually so settled. This point being established, it next became a question whether, as a right of dower attached upon the estate in fee which became vested until the exercise of the power of appointment, a subsequent exercise of the power could drive it out,—a question upon which differences of opinion existed for a considerable time.[1] In Cave *v.* Holford,[2] Mr. Justice Heath expressed an opinion that the power would enable the donee to bar the claim of dower. In Cox *v.* Chamberlain,[3] Lord Alvanley spoke rather dubiously of the question. He said that by the execution of the power, the estate in fee might be superseded, "though, perhaps, not to bar dower." Lord Eldon appears to have thought with Mr. Justice Heath, that the appointment drove out all intermediate estates, and that the dowress could not sustain her claim of dower upon the new estate in the appointee of the power.[4] Many eminent lawyers, and among them Mr. Fearne and Mr. Sugden, were of opinion that the right of dower was defeated with the estate on which it attached, by the execution of the power.[5]

10. This question, however, is now set at rest by the case of Ray *v.* Pung,[6] in which lands were conveyed to such uses as C. D. should, by deed, appoint, and in default of, and until such appointment, to the use of C. D. in fee. C. D. afterwards, in execution of the power, by deed, duly made an appointment of the estate in favor of E. F. in fee. The appointment was made during the coverture of C. D., and it was held that his wife was thereby defeated of her dower in the lands. So in Kentucky, where A. made to B. a deed of gift, embracing both slaves and realty, in which deed was a special power in the nature of an appointment, which B. executed by his last will according to the terms of the power, it was held that his widow was not entitled to dower in the lands so disposed of.[7]

11. But if the husband die without executing the power, the right of dower becomes absolute. This point is well settled in England,

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[1] Sugden's note, Gilb. Uses, p. 321; see note (2) Co. Litt. 216, a.

[2] Cave *v.* Holford, 3 Ves. Jr. 657.

[3] Cox *v.* Chamberlain, 4 Ves. Jr. 637.

[4] See Maundrell *v.* Maundrell, 10 Ves. Jr. 263, 265–267.

[5] 1 Fearne, Cont. Rem. 347, note; 2 Sugden, Powers, 34 *et seq.*; and see Park, Dow. 186–190; 4 Kent, 51; see, also, Wilde *v.* Fort, 4 Taunt. 334.

[6] Ray *v.* Pung, 5 B. & Ald. 561; 7 Eng. C. L. 193; S. C. 5 Madd. 310.

[7] Thompson *v.* Vance, 1 Met. (Ky.) Rep. 670; S. C. 7 Amer. Law Reg. 222; see, also, Chinnubbee *v.* Nicks, 3 Port. (Ala.) R. 362, where this doctrine is discussed and approved.

and has been decided in the United States. Thus, in South Carolina, in the case of Peay *v.* Peay,[1] A., for a consideration paid by B., conveyed to C. a tract of land "in trust for the use of B., his heirs and assigns forever, and to permit the said B. to have and possess the same, and to enjoy the profits thereof, and in trust to convey the same to such person or persons as the said B. shall, by deed or will, or other writing under his hand, direct and appoint," and it was held that B. took, under the statute of uses, at least a qualified or determinable fee in the land, and, never having exercised the power of appointment, that his widow was entitled to dower. And the disposition of the estate must be referrible directly to the power in order to defeat dower. Thus, where a person, prior to his marriage, conveyed certain land, in trust for such use, and such person as he should afterwards appoint by deed or will, and in default of, and until such appointment, to the use of himself and heirs, and afterwards, by his will, devised *all* his real estate to his children by a former wife, it was held that his widow was dowable of the land in question, the disposition by will being regarded as an ordinary devise, and not as an execution of the power. "The testator," the court remarked, "had an estate devisable in him, and power, also, to limit an use; he had an election to pursue which of them he would, and when he devised the real estate itself, without any reference to his authority, or power, he declared his intent to devise an estate as owner of the land, by his will, and not to limit an use according to his authority. . . . . There being no execution of the power, the land passed by the will itself, and not by virtue of the execution of the power."[2]

12. A devise to the husband for *life*, expressly, with remainder to such persons as he shall by deed, or will, or otherwise, appoint, will not give him the absolute interest, although he may acquire it by the exercise of his power.[3] And if he should die before making an appointment to himself under the power, his widow would not be entitled to dower.[4]

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[1] Peay *v.* Peay, 2 Rich. Eq. 409; see, also, Hawley *v.* James, 5 Paige, 318, 455.

[2] Link *v.* Edmondson, 19 Misso. 487.

[3] 1 Sugden on Pow. 119, pl. 6; see Barford *v.* Street, 16 Ves. Jr. 135.

[4] Thompson *v.* Vance, 1 Met. (Ky.) Rep. 670; see Collins *v.* Carlisle's Heirs, 7 B. Mon. 14; McGaughey *v.* Henry, 15 B. Mon. 883.

Estates determinable under collateral limitations.

13. Estates created by way of *collateral* limitation are subject to dower. The following is given by Jenkins as an instance of a limitation of this character: "So of a grant of rent or land to one and his heirs till the building of St. Paul's be finished."[1] It is well settled, however, that dower ceases with the event which terminates the estate. In all these cases the maxim, *cessante statu primitivo cessat derivativus*, applies.[2] "If this contingency happens," adds Jenkins to the above quotation, "dower shall cease."

14. In some instances the determination of an estate of inheritance is the result of a collateral limitation *implied* in law, as in the case of a gift in tail with a reservation of rent to the donor and his heirs.[3] Here, upon the death of the donee in tail without issue, the right of dower in the *rent* of the wife of the donor ceases, for thereby the estate from which the rent is derived is determined.[4] And it seems that the operation of a collateral limitation, whether express or implied, will defeat dower, as well where it converts the estate of the husband into a mere life estate, as where it determines it altogether. As where the husband is tenant of a determinable fee derived from an estate tail special, and during the coverture the determinable fee becomes an estate *pur auter vie*, by the tenant in tail becoming tenant in tail after possibility of issue extinct. Mr. Preston has expressed some doubt upon this point,[5] but Mr. Park maintains the proposition with much confidence, and appears to be sustained by authority.[6]

Estates determinable under conditional limitations, or by executory devise.[7]

15. Whether the wife is dowable of an estate conferred upon the husband by way of *conditional* limitation, or subject to an *executory*

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[1] Jenk. Cent. 1, Ca. 6.

[2] 3 Prest. Abst. 373; Butler's note, Co. Litt. 241, a. [3] See ch. 18, § 2.

[4] The distinction between the right of dower of the wife of the *donor* in the *rent*, and of the wife of the *donee* in the *land*, is explained in ch. 18, § 2 *et seq.*

[5] 3 Prest. Conv. 173.

[6] Park, Dow. 165–7; Plow. 155; Hughes on Writs, 182.

[7] As to the distinction between a conditional limitation and an estate upon condition, see ante, § 3.

devise, after his estate has been divested by operation of the limitation or devise, is a vexed question, in respect of which eminent jurists and able conveyancers, both in England and the United States, have entertained conflicting opinions. We have seen that where an estate expires by force of its *natural* limitation, or, as it is sometimes expressed, where it is *spent*, the right of dower is not disturbed.[1] Upon this point there is no doubt nor controversy. The difficulty arises where the estate is so limited that upon the happening of a certain event it is to pass to a third person; or where, upon the death of the devisee *in fee* without issue, the estate is devised over. In the first of these cases, if the event happen, the estate of the husband is thereby absolutely divested. In the other, if he die without issue, his estate is absolutely determined. In neither case does the estate expire by force of its natural limitation, but in virtue of the express limitations and conditions to which it was subject by the original grant or devise. Whether, after the estate has thus terminated, a right of dower continues to exist, is the question.

16. The case of Sammes *v.* Payne, decided in the 29th of Elizabeth, is the earliest reported case appearing to touch this question, and it is sometimes cited as an authority in support of the proposition that curtesy, and by analogy, dower, shall continue after the determination of an estate by the operation of a conditional limitation or executory devise. But it is very questionable whether it can properly be regarded as an authority upon this point. The facts, as stated by Leonard and Anderson,[2] were as follows: One Jayne Payne, being seized in fee of the lands in question, conveyed the same to the use of herself for life, remainder to the use of Elizabeth Payne, her eldest daughter, in tail, *upon condition* that the said Elizabeth, or the heirs of her body, should, within one year after the death of the said Jayne Payne, or within one year next after Joan, the younger daughter of the said Jayne, should attain the age of eighteen years, pay to the said Joan, or the heirs of her body, thirty pounds. And if the said Elizabeth should die without issue before the time of payment aforesaid, or if the said Elizabeth, or the heirs of her body should fail in the payment of the sum aforesaid, then to the use of the said Joan Payne in tail. The mother died. Elizabeth took husband, Thomas Sammes; had issue, and afterwards

[1] Ante, ch. 13, §§ 12–14, and § 1 of present chapter.

[2] Sammes *v.* Payne, 1 Leon. 167; S. C. 1 And. 184.

died without leaving issue, before the said Joan came to the age of eighteen years. The question was whether Thomas Sammes was entitled to be tenant by the curtesy. Against the claim to curtesy it was argued that the estate tail of Elizabeth was defeated by the non-payment of the thirty pounds, according to the limitation of the uses, and that therefore no right to curtesy existed. It will be observed that the argument was not placed upon the ground that the estate of the wife had determined by reason of failure of issue living at her death, for, as to *estates tail*, as we have seen, this is regarded as the expiration of the estate by its *regular* limitation, and in such case the right to curtesy or dower is confessedly preserved;[1] but the objection urged was predicated upon the alleged breach of the condition of payment contained in the grant, upon the happening of which the estate was to shift and become vested in Joan, the younger daughter. The court, however, determined the question in favor of the husband. Leonard reports the judges as placing their decision upon the following ground: "As to the condition of payment of the said sum, *the same is not determined*, for she died without issue before the day of payment, *scil.*, before the second daughter came of the age of eighteen years, and as to that there is no condition broken; and as to the point of dying without issue, the same is not a condition, but rather a limitation of the estate, and the same is no more than what the law saith, and the estate tail in Elizabeth is spent and determined *by the dying without issue*, and doth not cease, or is cut off by any limitation."

According to this language the court denied that the condition of payment was broken, as assumed by counsel, and upon which assumption alone it was insisted that curtesy was defeated. They held that the estate tail of Elizabeth expired by its regular limitation upon her death without issue living, *before* the time limited for payment. As her estate had thus terminated, and the limitation over to the younger daughter had consequently taken effect, there was nothing upon which the condition subsequently to be performed could operate. The conclusion of the court, therefore, as above expressed, was simply that curtesy is not defeated by the determination of the estate of the wife by its natural limitation.

In addition to the above reasoning, however, Leonard reports Anderson, J., as stating this further proposition: "If a feoffment

[1] Ante, ch. 13, §§ 12–14.

be made to the use of J. S. and his heirs until J. D. hath done such a thing, and then unto the use of J. D. and his heirs, the thing is done, and J. S. dieth, his wife shall be endowed."[1] But it is to be remarked that the case, as reported by Anderson himself, contains no such language;[2] and Goldsborough, who also reports the case, makes Anderson say that "if an estate be determined by *limitation*, this will not avoid a tenancy by the curtesy; but otherwise it is if the estate be determined by a *condition*, for this relates to the defeasance of the estate."[3] This mode of stating the point leaves the case of a conditional limitation untouched, and merely takes the broad ground of distinction between estates spent, and estates defeated, for by the term "limitation," as here used, is obviously meant a simple limitation.[4]

17. In the report of the case by Coke, no notice is taken of the condition as to payment, nor of the limitation over in case of non-payment. He reports the case as being simply a gift of lands to the elder daughter in tail general, remainder to the younger daughter in tail general. That the elder daughter married, and had issue, which died. That afterwards the elder daughter died, whereby her estate tail was determined, and the lands passed to the younger daughter by the limitation over. And that by the judgment of the court the husband of the elder daughter was declared to be entitled to curtesy.[5]

18. Sammes *v.* Payne was followed by the case of Flavill *v.* Ventrice,[6] decided in the 10th of James I., a short report of which is given, as follows: "If A. seized in fee of lands, covenants to stand seized thereof, to the use of himself and his heirs, till C. his middle son takes a wife, and after, to the use of C. and his heirs; and after, A. dies, by which it descends to B. the elder son of A. who has a wife and dies, and after, C. takes a wife, *it seems* the wife of B. the elder son shall not be endowed of the said estate of her husband, *because his estate is ended by an express limitation*, and therefore, the estate of the wife being derived out of it, this can not continue longer than the original estate. P. 10 Ja. B., between Flavill and Ventrice, dubitatur upon a special verdict; for upon argument the court was divided, *scil.*, Crawley and Vernon that she shall not be endowed,

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[1] 1 Leon. 168. [2] 1 And. 184. [3] Goldsb. 81.
[4] Park, Dow. 169. [5] Paine's case, 8 Co. 84, a.
[6] Flavill *v.* Ventrice, 2 Danv. Abr. 655; 9 Vin. Abr. 217, F. pl. 1.

and Hutton and Heath *e contra*. Intratur Tr. 8 Car. Rot. 1343." The judges being equally divided, the point was not determined. The case, however, furnishes evidence that the law was considered in an unsettled condition at the period when it arose. In Heyns *v.* Villars,[1] decided in 1658, the above case was cited at the bar by the name of Rochester and Venters, and it was added that it was a question to that day whether the feme should have dower.[2]

19. An interval of more than eighty years here occurs in which there is no reported case touching the question. The case next in order appears to be Sumner *v.* Partridge, determined July 25, 1740, which is briefly reported by Atkyns.[3] The point considered by the court arose upon the following case: "Devise to A. and her heirs, and if she die before her husband, he to have £20 a year for his life; remainder to go to her children. The wife died before the husband." It was held that the husband was not entitled to curtesy.

With regard to this case it may be remarked, that upon the death of the wife, living the husband, the estate did not *descend* to the children, but passed to them as *purchasers* by virtue of the original limitation; a feature which, with respect to its influence upon the question under discussion, will be more particularly noticed hereafter.[4]

20. The case of Goodenough *v.* Goodenough is referred to by Mr. Preston as supporting the claim of dower in estates determined by conditional limitation or executory devise.[5] This case is briefly noticed by Dickens.[6] The following statement of it, extracted from the Register's Book,[7] is taken from Mr. Jacob's Addenda to Roper on Husband and Wife.[8]

R. Serle devised certain estates to his nephew, William Goodenough, and his heirs forever, subject to the limitation and condition after mentioned; viz. that in case his said nephew should happen to die unmarried, and without issue of his body lawfully begotten, his will was, that the devise and devises thereinbefore made, should, in any or either of those cases, cease and be absolutely void; and in that case he gave the estates to his nephew, Richard Jocelyn Good-

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[1] Heyns *v.* Villars, 2 Sid. 64.

[2] Park, Dow. 172. The case is also cited by Twisden, J., 1 Vent. 377.

[3] Sumner *v.* Partridge, 2 Atk. 47.

[4] Infra, § 29.

[5] 3 Prest. Abstr. 372.

[6] Dick. Ch. R. vol. ii. 795.

[7] 31 Jan. 1772; Reg. Lib. A. 1771, fo. 557.

[8] 2 Roper, Husb. and Wife, by Jacob, 504, 505.

enough. The testator died, leaving R. J. Goodenough his heir at law. William Goodenough afterwards married the plaintiff, having first, by articles previous to the marriage, agreed to settle lands of sufficient value to secure a jointure of £200 per annum to her for life, with remainder to the issue of the marriage. By his will, William Goodenough gave his personal estate to the plaintiff, and appointed her executrix, and recited that his brother Richard would have the estates left him after his (William's) death by R. Serle, and as he left them to his brother without any litigation, which there was the greatest room for, he hoped he would have the generosity to pay his wife her dower regularly, and without dispute. He died without issue, leaving his brother his heir at law.

The bill prayed that the plaintiff's jointure might be made good out of the lands devised by Serle, or that she might be endowed out of those lands. It submitted, that the estate of William in those lands became absolute on his marriage; or that, if the devise over was intended to take effect on his dying without issue, then that it was void, as being too remote, or that it reduced the estate of William to an estate tail; and therefore that the plaintiff was entitled to dower. The defendant, R. J. Goodenough, by his answer, insisted that there was no agreement on the marriage of the plaintiff for a settlement of the lands in question; and submitted that she was bound, out of the personal estate of her husband, to purchase lands of the value of £200 per annum, upon the trusts of the marriage articles, under which he would become entitled on her death. He submitted, that the executory devise in the will of R. Serle was intended to take effect on the death of William, unmarried, *or* without issue; and that the testator having coupled those events in the same sentence, the latter must be understood to refer to the death of William, and therefore was not too remote.

The decree declared, that according to the true construction of the will of William Goodenough, the plaintiff was entitled to have *dower*, only, out of the estates of which he died seized, and referred the case to a master to take an account of the rents and profits, and to set apart and allot sufficient of the said estates, as and for the dower of the plaintiff therein.

21. But in Buckworth *v.* Thirkell,[1] decided in 1785, the subject

[1] Buckworth *v.* Thirkell, 1 Coll. Juris. 382; 3 Bos. & Pul. 652, note; Butler's Co. Litt. 241, a., note.

underwent very full and elaborate discussion. The opinion was pronounced by Lord Mansfield, and the case is generally regarded as the leading one upon the questions involved. The following is a statement of the facts:—

Joseph Sutton devised certain lands to trustees in fee, in trust to receive the rents and profits and apply them for the maintenance of Mary Barrs, granddaughter of the testator, until she should arrive at the age of twenty-one years, or be married; and from and after her attaining such age, or being married, he gave and devised the lands to the said Mary Barrs, her heirs and assigns forever. But in case the said Mary Barrs should happen to die before she arrived at the age of twenty-one years, and without leaving issue of her body lawfully begotten, then, from and after the decease of the said Mary Barrs without issue as aforesaid, he gave and devised his said estates to his grandson, Walter Barrs, and to his assigns for his natural life, remainder over. Mary Barrs married Solomon Hansard, had a child by him, which died during her lifetime, and herself died under the age of twenty-one years, without leaving any issue. On the trial of an action of replevin, a special case was reserved for the opinion of the court upon the above facts, whether Solomon Hansard was entitled to be tenant by the curtesy. The case was twice argued at the bar by desire of the court. The distinction made and relied upon in the argument, was between estates spent or expired, and estates defeated by way of condition. With respect to estates tail, it was argued that "before the statute *de donis* estates tail were conditional fees, but on the birth of a child, the condition was considered as performed, so as to become an absolute estate to three purposes: 1st, that the donee in tail could alien; 2dly, could forfeit; 3dly, it was descendible to the issue of a second marriage, and of course gave curtesy to the husband of a second marriage. The statute *de donis* took away the power of alienation, and the curtesy of the second husband, but left the right of the husband of the first marriage to be tenant by the curtesy as it stood before the statute, [viz. notwithstanding the failure of issue,] that is, as being the husband of a woman whose estate on condition was become absolute by birth of a son. This accounted for husbands being tenants by the curtesy of estates tail, but it explained the difference between estates tail and estates defeasible on condition, such as the present, and proved how inapplicable the case of an estate tail was to the present

estate as to the right of the husband to curtesy."[1] Against this it was urged that the devise operated as a conditional limitation, and not merely to create an estate upon condition, for the defeasance, it was said, had no relation to the time of creating the estate, as in the case of a condition merely, the breach of which avoids all mesne incumbrances.[2] The judgment of the court is reported as follows:—

"Lord Mansfield. Tenancy by the curtesy existed before the statute *de donis*, and the definition of it is, that the wife must be seized of an estate of inheritance, which, by possibility, her issue by the husband may inherit, and there must be issue born. Estates at that time were of two sorts, conditional, or absolute, and curtesy applies to both equally. I can not agree with the argument, that on performance of the condition, by birth of a child, the estate became absolute; it was so by a subtlety in odium of perpetuity, and for the special purpose of alienation, but for no other. It otherwise reverted to the donor on failure of the issue, according to the original restriction. At common law, the only modification of estates was by condition. The statute of uses introduced a greater latitude of qualification, but there arose a great dread of letting in perpetuities by means of the extensive operation of that statute; and in the time of Elizabeth and James, many cases were decided with a view to prevent that effect; with this view, it was allowed to bar contingent remainders before the person who was to take came into *esse;* others were held to be too remote in their creation. The cases proceeded in that view too far, and estates were too much loosened, and it became necessary to restrain them again; and in the time of the troubles eminent lawyers, who were then chamber counsel, devised methods which, on their return to Westminster Hall, they put in practice, such as interposing trustees to preserve contingent remainders. It is not of long date that the rules now in use have been established. I remember the introduction of the rule which prescribes the time in which executory devises must take effect, to be a life or lives in being, and twenty-one years afterwards.

"It is contended that this is a conditional limitation. It is not so, but a contingent limitation; all the cases cited go upon the distinction of their being conditions, and not limitations. During the life of the wife she continued seized of a fee simple, to which her

[1] 1 Coll. Juris. 334.

[2] 3 Bos. & Pul. 653, note.

issue might by possibility inherit. I am of opinion that the defendant is entitled to be tenant by the curtesy.

"The rest of the court assenting, judgment for the defendant."[1]

22. The facts in Buckworth *v.* Thirkell, as reported, appear to make the limitation over a clear case of executory devise. Upon her marriage, Mary Barrs became seized of an estate in fee simple, for the devise was to her and her *heirs* from and after attaining twenty-one, *or* upon her marriage. Upon the happening of either event she was to take the fee. But upon her death within the age of twenty-one, *and* without issue *living at her death*, her estate was to determine and pass over to the grandson of the testator. Upon her marriage, therefore, she occupied, substantially, the position of a devisee in fee with a limitation over in the event of his death without issue living; the only difference being that in the reported case, in order to divest the estate, it was necessary that the death of the devisee should occur within a limited period. In point of principle, however, this would make no difference as regards the question involved. The case, therefore, is to be considered as expressly deciding that the determination of an estate by operation of an executory devise, does not defeat the right of the widow to dower, nor of the husband to be tenant by the curtesy.

23. Very few cases in modern practice have provoked so much discussion, or been the subject of so much animadversion, as Buckworth *v.* Thirkell. Lord Alvanley is reported to have remarked that "it occasioned some noise in the profession at the time it was decided."[2] It is referred to in terms of decided disapprobation by Mr. Butler in one of his notes to Coke on Littleton. The following observations precede that writer's review of the case and of the grounds assigned by Lord Mansfield for the decision: "As to estates in fee simple conditional at the common law, and estates tail under the statute *de donis*, the wife was entitled to her dower, and the husband to his curtesy, out of them, after the failure of the issues in tail. But, it may be observed that though it is now difficult to avoid considering estates in fee simple conditional, in any other light than as estates originally granted to the donee, and to the heirs general, or to some particular heirs of his body; and the estate of the donor, as that of a reversion expectant on the failure of those heirs; yet this restriction to particular heirs, and exclusion of others, is under-

[1] 3 Bos. & Pul. 652, note. [2] In Doe *v.* Hutton, 3 Bos. & Pul. 653.

stood to be produced, not by any limitation of persons introduced into the grant, but by a condition supposed to be annexed to it, that if there were no such heirs, or being such, if they afterwards failed, and the donee did not alien the estate, it should be lawful for the donor and his heirs to enter. This entry, therefore, was not an entry upon the *natural expiration of a previous estate*, but for a condition broken; in which case, as in all others where entry is made for breach of a condition, the right of a wife to her dower, and the husband to his curtesy, if the general rule were adhered to, would be defeated. But, for reasons now rather to be guessed than demonstrated, this case was made an exception from the general rule. So with respect to the right of the wife of tenant in tail to her dower, and the husband to his curtesy, after the failure of the issues in tail; the statute *de donis* introduced no new estate, but only preserved estates limited as conditional fees to the issues inheritable under them, by preventing the tenants of such conditional fees from alienating or disposing of them, and as they preserved the estates, so they preserved the incidents belonging to them, and among others, the right of the wife to her dower, and the husband to his curtesy."[1]

To these remarks the same writer adds his views with regard to what he terms *limited* fees. "As to limited fees, by which, in this place, are to be understood those fees which are qualified, not because the estate of the grantor is limited—(such as those which are classed under the third distinction)—but those which, being created by a person seized in fee simple, are, by the original grant by which they are created, only to continue to a certain event; as a grant to A. and his heirs, tenants of the manor of Dale, or to A. and his heirs while there shall be heirs of the body of B.:—or those fees which are originally devised or limited in words importing a fee simple or fee tail absolute and unconditional, but which, by subsequent words, are made determinable upon some particular event;—as to fees of this description, it should seem by the case cited in the note to F. N. B. 149, G., and the cases of Flavill *v.* Ventrice, Roll. Abr. 676, and Sammes *v.* Payne, 1 Leo. 167, 1 And. 184, 8 Rep. 34, Goulds. 81, that where the fee, in its original creation, is only to continue to a certain period, the wife is to hold her dower, and the husband his curtesy, after the expiration of the period to which the fee charged with the dower or curtesy, is to continue; but that where the fee is

[1] Butl. Co. Litt. 241, a., note.

originally devised in words importing a fee simple, or fee tail absolute and unconditional, but by subsequent words is made determinable upon some particular event; there, if that particular event happens, the wife's dower and the husband's curtesy cease with the estate to which it is annexed. Such appears to be the distinction established by the foregoing cases."

24. The learned annotator then proceeds to notice the case of Buckworth *v.* Thirkell. "By a manuscript report of this case," he remarks, "the ground upon which the court appear to have formed their opinion on it, is an analogy they supposed it to bear to the cases of estates in fee simple conditional, and estates tail; in both of which dower and curtesy continue after failure of the issues; and in both of which the wife being seized of a fee, to which the issue might, by possibility, inherit, entitles the husband to curtesy. Some observations have been offered above, to show that the continuation of dower and curtesy in the cases of estates in fee simple conditional, was an exception to a general rule, (dower and curtesy, in all other cases of conditions, being defeated by the entry for the condition broken,) and that the same reasoning may be applied to the continuation of dower and curtesy out of an estate tail, after the failure of issue. It may therefore seem singular that the court, on this occasion, should prefer reasoning by way of analogy from the only admitted *exception* to the rule, to reasoning by analogy from the general rule itself. It is the more singular, as the general case of estates on condition approached nearer to the case then under the consideration of the court, than the particular case of estates in fee simple conditional, or estates tail, for the distinguishing feature of the devise which gave rise to the case before the court, (as of all devises of that description,) is, that after the whole fee is first devised, it is made defeasible by a subsequent clause. Now, neither an estate in fee simple conditional, nor an estate tail, has any such defeasible quality or incident annexed to it, but this quality forms the very essence of all other estates upon condition. With respect to the application of the maxim that where the issue may, by possibility, inherit, the husband shall have his curtesy, (and so *vice versâ* of dower;) in every place in the books where that is mentioned, it is to introduce an inquiry whether the wife, being in the actual seizin of an estate, was in fact seized of an estate, the *quality* of which was such, that the issue of the husband might inherit it, but never with a view to show that the *quantity* of the estate was such that it

might endure so long as to be inheritable by the issue. On the contrary, when the wife's estate is evicted by title paramount, or by an entry for the breach of a condition, in both cases the issue might have inherited; but the husband would be entitled to his curtesy in neither after the eviction or entry. Another difference between the case of an estate in fee simple made defeasible by a subsequent executory limitation or devise, and that of an estate in fee simple conditional, or an estate tail, is, that an estate in fee simple, made defeasible by an executory limitation or devise, can not, by any means whatever, be discharged by the first taker or devisee, from the operation of the subsequent limitation or devise, but an estate in fee simple conditional may, immediately after the birth of a child, and an estate tail immediately after marriage, be destroyed, and a fee simple absolute acquired, by the husband and wife joining in a fine or common recovery. The case is the same with respect to the wife's right of dower. Besides, the quality we are speaking of is not sufficient of itself to entitle the husband to curtesy or the wife to dower; it is only one of many incidents which the estate ought to have to give that title."[1]

25. Mr. Park also expresses marked dissent from the views of Lord Mansfield in Buckworth *v.* Thirkell. "The latter passage," he observes, referring to the opinion of that judge, "in which he is made to assign as a reason for his decision, that it was not a conditional limitation, is not easily reconcilable with the case stated. The original limitation to Mary Barrs was expressly a limitation of the fee, and the subsequent estate being limited in derogation of that fee, and not upon the determination of a prior particular estate, was necessarily a conditional limitation. If it was not so, it is difficult to conjecture what Lord Mansfield understood by a conditional limitation. It might, perhaps, be thought that his lordship's observations, as above stated, merely intended to take the distinction between a limitation and a condition, properly so called. But the language as stated in the report of the case in Collect. Jurid. is still more irreconcilable with any correct view of the law, in application to the facts of the case stated. It is as follows: 'Now it is contended that this is a conditional limitation: It is no such thing. There is no condition in it. It is a contingent limitation. If it is a limitation it does not defeat the right of the husband to be tenant by the cur-

[1] Butl. Co. Litt. 241, a., note.

tesy, though the estate is spent."[1] It is certainly inconsistent with all ideas entertained in modern practice, to consider an estate originally limited in fee and abridged by a subsequent limitation over upon the happening of a particular event, in any such light as that implied by the observation that it was *spent* upon the happening of that event. Indeed, were not the observations of Lord Mansfield found in a case, which, as reported, was indisputably that of a conditional limitation, they would, without doubt, have been considered as establishing the general distinction, as to dower and curtesy, between estates expiring by their natural and regular limitation, and estates abridged or defeated by some collateral term annexed to their creation. So far as the language of the judgment is to be relied on, it would seem to proceed upon the very distinction which Buckworth and Thirkell is daily cited to overturn."[2]

26. Some of the leading English text writers avoid expressing any opinion upon this question. Burton and Preston are among this number.[3] Atkinson, in discussing the point, employs this language: "Where the husband's estate is defeated by title paramount, as by entry for condition broken, by reason of a defective title in the grantor, or by shifting use, the right to the dower is also defeated; but where the husband's estate is defeated by executory devise, it has been settled, rather anomalously, it has been thought, that the widow shall nevertheless be entitled to dower."[4] Mr. Jacob, the learned editor of Roper on Husband and Wife, upon an able review of the cases, and a thorough discussion of the question, inclines strongly against the right of dower where the estate is determined, either by a shifting use or an executory devise.[5]

27. Other distinguished writers upon the Law of Real Property, however, unhesitatingly support the doctrine of Buckworth *v.* Thirkell. Among these may be named Jarman, Roper, and Bisset. Mr. Jarman thus states the law: "It is to be observed, too, that an immediate estate in fee, defeasible on the taking effect of an executory limitation, has all the incidents of an actual estate in fee simple in possession, such as curtesy, dower, &c.; the devisee having the inheritance in fee, subject, only, to a possibility."[6]

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[1] 1 Coll. Jur. 836. [2] Park, Dow. 177–179; see, also, p. 185.

[3] Burton, Real Prop. § 356; 3 Prest. Abstr. 373.

[4] 1 Atkinson, Conv. 258. [5] App. No. II., 2 Roper on Husb. and Wife, 502.

[6] 1 Jarman on Wills, 792; 1 Roper, Husb. and Wife, 38–43, 377; Bisset, Est. for Life, 82–7, are to the same effect; see, also, 2 Crabb, Real Prop. 167.

28. The case of Moody *v.* King,[1] decided since the greater part of the foregoing discussion occurred, is directly in point, and appears to fully support the judgment of Lord Mansfield upon this much mooted question. In that case the father of W. F. devised to him and his heirs forever, certain real estate, subject to the payment of an annuity; and if the said W. F. should have no issue, the estate, on his decease, was to become the property of the heir at law, subject to such legacies as W. F. might leave by will to any of the younger branches of the family. It was decided that under this devise, W. F. took an estate in fee, with an executory devise over, in the event (which happened) of his dying without issue, to the person who should then be the testator's heir at law.[2] It then became a question whether the widow of W. F. was entitled to dower, and a bill having been filed by her for that purpose, a case was stated for the opinion of the judges of the Common Pleas, who certified in her favor. Buckworth *v.* Thirkell, and Goodenough *v.* Goodenough,[3] were the authorities chiefly relied on for the judgment of the court. The court were also of opinion that from the nature of the limitation the case came within the rule stated by Littleton,[4] according to which the right of dower exists where the husband's estate is such that the issue the wife may have by him may take by descent.

29. In the more recent case of Barker *v.* Barker,[5] the question again came up for consideration. The Vice-Chancellor, by whom it was determined, went into a review of the cases of Sumner *v.* Partridge,[6] Buckworth *v.* Thirkell, and Moody *v.* King, and endeavored to reconcile the first of these cases with the last two upon the distinction that in the first case the issue of the wife took the estate by force of the gift, as *purchasers*, and not by descent from her, while in the two other cases the issue of the wife, in the one case, and of the husband, in the other, would take by descent as heirs at law, and not as purchasers, under the limitation; and upon this distinction he denied curtesy to the husband in the case before him. The case was this: Devise to A. and her heirs; but if she died leaving issue, then to such issue and their heirs. A. died leaving issue, and a husband. The husband claimed curtesy. "It was

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[1] Moody *v.* King, 2 Bing. 447; 9 Eng C. L. 475.
[2] See Doe, dem. King *v.* Frost, 3 Barn. & Ald. 546; 5 Eng. C. L. 373
[3] Supra, §§ 20, 21.
[4] Sec. 53.
[5] Barker *v.* Barker, 2 Sim. 249; 2 Cond. Eng. Ch. R. 406.
[6] Supra, § 19.

said," observed the Vice-Chancellor, "that this case was decided by Sumner *v.* Partridge, where there was a devise to A. and her heirs, and if she died before her husband, he was to have £20 a year for life, remainder to go to her children. A. died before the husband; but the court held that he was not tenant by the curtesy. In opposition to that case, two cases were cited. The first was Buckworth *v.* Thirkell, where an estate was devised to trustees in trust for Mary Barrs, till she attained twenty-one, or married, and then to the use of her and her heirs, with a devise over in case she died under the age of twenty-one, and without leaving issue. The events were that she married, and had a child; the child died, and then the mother died under twenty-one; and the question was, whether the husband was entitled to be tenant by the curtesy, which entirely depended upon whether she had such an estate, as, by possibility, her issue might inherit. The case was twice argued, and Lord Mansfield says that, during the life of the wife, she continued seized of a fee simple to which her issue might, by possibility, inherit; and had she attained twenty-one, her vested estate would have descended on her issue. The consequence was, that her husband was held to be entitled to be tenant by the curtesy. The second case was Moody *v.* King, where there was a devise to W. Frost and his heirs, but if he should have no issue, the estate devised was, on his decease, to become the property of the heir at law. Now it is manifest that W. Frost had an estate that might have descended on his issue, and that, on his dying without issue, that estate determined. But it was, nevertheless, held that his widow was dowable. But these two cases are distinguishable from Sumner *v.* Partridge, and from the one now under consideration. For, in Sumner *v.* Partridge, and the case now before me, the children take by force of the gift; in the two other cases, the devise over was to other persons. It is clear, therefore, that the estate which the wife had, is determined by her dying leaving issue, by which the children take as purchasers, by force of the gift. Therefore the wife had not such an estate as could descend to her children, they taking as purchasers. The consequence is that the husband is not entitled to be tenant by the curtesy."[1]

30. In a recent case Vice-Chancellor Stuart applied the doctrine of Moody *v.* King to an *equitable* determinable estate. A testatrix

[1] The opinion of the Vice-Chancellor in this case is referred to by Mr. Bisset in terms of high commendation. Bisset, Est. for Life, 85; 42 Law Lib.

devised to trustees certain freehold premises, in trust to receive the rents, and after paying thereout all proper outgoings, and applying therefrom any moneys that they thought fit, to the maintenance of F. S., to let the residue accumulate until F. S. should attain twenty-one, and then to pay such accumulations to him; but if he should die under age without leaving issue living at his decease, then such accumulations were to be applied for the benefit of the person to whom, and in the like manner and form, as the premises were limited in the like event; and when F. S. should attain twenty-one, then the trustees were to stand seized of the premises in trust for him in fee; but if he should not leave any issue living at his decease, then the trustees were to stand seized of the premises in trust for A. S. in fee; and if A. S. should not leave any issue living at his decease, then the premises were devised over. F. S. attained twenty-one, and died without ever having had issue. It was held, on the construction of the will, that an equitable estate in fee in the premises vested in F. S. on his attaining twenty-one, subject to be divested in the event of his dying without issue, which event having happened, the limitation over in favor of A. S. took effect; but that the widow of F. S. was nevertheless entitled to dower under the provisions of 3 and 4 Will. IV. chapter 105. "The question in this case," said the Vice-Chancellor, "as to the widow's right to dower, must depend upon the true construction of the act of Parliament, the 3 and 4 Will. IV. c. 105. The estate out of which the defendant Ann Elizabeth Spencer claimed to be entitled to dower, was an equitable one, in respect of which, consequently, no such claim could exist at common law, and she would not be entitled to any dower but for the late act of Parliament which said 'that where the husband should die beneficially entitled to any land, for an interest that should be an estate of inheritance in possession, then his widow should be entitled to dower.'[1] The question was whether the husband of this lady died 'beneficially entitled' to any lands, and if the interest which he had was an estate of inheritance in possession. The husband was tenant in fee simple, subject to an executory devise over in case he died without leaving a child or issue living at the time of his death. It seemed to him, upon a strict and liberal interpretation of the language of the will, that if he died seized of anything, he must have died seized of an estate of inheritance, for he certainly did not die

[1] See Appendix.

seized of a life estate. The estate which he had was an estate of inheritance; but although of inheritance, it was defeasible in this way—that in case he left no child or issue living at his death, then the estate was to go over to the person entitled to it. This interpretation of the language of the will seemed to him quite conformable to the common law doctrine, and it was an interpretation which reconciled the right given to the widow to have her dower out of the equitable estate, so as to make it analogous to the right which she would have had if it had been a legal estate. The language of Littleton in the 53 section, as to a legal estate, was very clear, and the interpretation of it in the case of Moody *v.* King was strict and proper. Littleton said 'that in every case where a woman taketh a husband seized of such an estate of tenements, &c. so that by possibility it may happen that if the wife have any issue by her husband, and that the same issue may by possibility inherit the same tenements of such estate as the husband hath, as heir to her husband of such tenements, she would have her dower, and otherwise not.' It was quite plain that in this case the husband was so seized that he might have had issue who would have inherited the land in such a manner as to have had the same estate as the husband; that was, an estate of inheritance. But the question did not rest upon the interpretation of the language of Littleton as applied to the case of a fee simple in the husband, with an executory devise over in case he left no child living at his death; for it was determined in the case of Moody *v.* King in the Court of Common Pleas—and that decision was adopted by this court—that in a case of this kind, though there be an executory devise over, yet the wife was dowable; and upon the same principle it seemed impossible properly to adopt any other interpretation. It could not be necessary to hold that the estate of which the husband died seized was transmissible to his heir in order to entitle the wife to dower; because it was certain and undoubted law, that if there be a tenant in tail with a remainder over in fee, although the tenant in tail should die without leaving any issue, so that the estate in remainder in fee took effect, the wife was dowable as against the remainder-man; and in principle it seemed impossible to say that an estate of which the tenant in tail was seized at his death for an estate tail, could be, in any respect; different from an estate given to a tenant in fee simple who died seized of that estate, but because he died without leaving a child, an executory devise over took effect. The principle seemed the same in both cases, and

therefore he felt compelled to hold, upon the true construction of the statute, that the widow of this tenant in fee simple was, notwithstanding that the executory devise over took effect, entitled to dower as against the executory devisee."[1] Upon appeal to the Lord Chancellor, the decree of the Vice-Chancellor was affirmed.[2]

31. In the United States, as in England, the discussion of this subject has not resulted in an entire unanimity of opinion. Chancellor Kent maintains that "the ablest writers on property law are evidently against the authority of the case of Buckworth *v.* Thirkell, and against the right of the dowress, when the fee of the husband is determined by executory devise or shifting use."[3] Mr. Hilliard, while appearing to recognize the authority of that case, nevertheless adopts, substantially, the distinction insisted upon by Mr. Butler.[4] But Mr. Washburn, after reviewing the authorities, concludes that the tendency of the modern cases, both English and American, is to support the right to dower out of estates which have been determined by executory limitations.[5] And it would seem that the adjudged cases are in harmony with this proposition.

32. The English cases have already been referred to. The American cases will now be noticed. The point was considered by Chief Justice Gibson in Evans *v.* Evans.[6] In that case a testator had devised lands to two sons, G. and O., their heirs and assigns, but if either should die without having lawful issue living at his death, his estate was to vest in the surviving brothers and sisters. One of these sons died without issue, living the other son, and the question was made whether his widow was entitled to dower. An affirmative decision was given. Chief Justice Gibson, who discussed the subject at length, dissented from the distinction taken by Mr. Butler.[7] "I have a deferential respect for the opinion of Mr. Butler," he remarked, "who was, perhaps, the best conveyancer of his day, but I can not apprehend the reasons of his distinction in the note to Co. Litt. 241, a., between a fee limited to continue to a particular period at its creation, which curtesy or dower may survive, and the devise

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[1] Smith *v.* Spencer, V. C. Stuart's Court, July, 1856, 2 Jurist, N. S. 778. A brief note of the case is also contained in 19 Law Reporter, 515.

[2] Smith *v.* Spencer, 6 De Gex, Macnaghten & Gordon's Rep. 631. Upon the appeal, however, no question appears to have been made with respect to dower.

[3] 4 Kent, 50.

[4] 1 Hilliard, Real Prop. 114, §§ 23, 24.

[5] 1 Washb. Real Prop. 216.

[6] Evans *v.* Evans, 9 Barr, 190.

[7] Ante, § 23.

of a fee simple or a fee tail, absolute or conditional, which, by subsequent words, is made determinable upon some particular event, at the happening of which dower or curtesy will cease." "How to reconcile to any system of reason, technical, or natural, the existence of a derivative estate, after the extinction of that from which it was derived, was for him to show, and he has not done it. The case of a tenant in tail, says Mr. Preston,[1] 'is an exception arising from an equitable construction of the statute *de donis*, and the cases of dower of estates determined by executory devise and springing use, owe their existence to the circumstance that these limitations are not governed by common law principles.'[2] The mounting of a fee upon a fee by executory devise is a proof of that." "Before the statute of wills there was no executory devise, and before the statute of uses there were no springing uses." "It was to the benign temper of the judges who moulded the limitations of the estates introduced by them, whether original or derivative, so as to relax the severer principles of the common law, and among other things, to preserve curtesy and dower from being barred by a determination of the original estate, which could not be prevented."

33. A similar case was determined in Kentucky. A., the testator, devised a portion of his real estate to B., his wife, for life, and after her death the same property, together with certain other lands, to C., his son, in fee. But he directed that in case his son died in the lifetime of B., or subsequently to her death, without leaving issue, then the estate should go to the sisters of the testator and to the brothers of B. The son died without issue, in the lifetime of B. As to the lands devised to him immediately in fee his widow was allowed dower, upon the ground that her issue by him, had there been any, would have taken the estate by descent; but as to the lands in which the widow of the testator had a life estate no dower was allowed, the life estate not having terminated during the coverture.[3]

34. In Milledge *v.* Lamar,[4] decided in South Carolina as early as

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[1] 3 Prest. Abstr. 373.

[2] The Chief Justice does not complete the quotation. The following forms the concluding portion of the passage: "And when the limitation over was allowed to be valid against the former donee, it was on the terms that the limitation over should not impeach the title of dower of the wife of that donee." To this Mr. Park responds: "The writer has not hitherto been so fortunate as to meet with the passages in the books from which this proposition is collected." Park, Dow. 183.

[3] Northcutt *v.* Whipp, 12 B. Monr. 65.

[4] Milledge *v.* Lamar, 4 Desauss. 617, 687.

1817, the same question was adjudicated. In that case lands were given to Thomas Lamar and his heirs "without any condition, except that should the said Thomas die without any heirs of his body begotten, then, and in that case, the whole of the then remaining property should be equally divided among the children of his brothers." Thomas Lamar died without heirs of his body, but leaving a widow, who instituted proceedings for dower. Her claim was resisted upon the ground, mainly, that the estate of the husband was a fee simple conditional, of which, as it was contended, a wife is not dowable. But the court thought otherwise, Desaussure, Chancellor, delivering the opinion: "To the claim of dower," he observed, "it was objected that Thomas had not such an inheritable interest in the lands as entitled his widow to dower. But I am of opinion he had. The limitation is to him and his heirs; but if he died without an heir of his body begotten, then over to his brother's children. If he had had an heir of his body, his children would have inherited. Now the text of Littleton is expfess, that where a woman taketh a husband seized of such an estate in tenements, &c., so that any issue she might have by him may, by possibility, inherit the said tenements of such an estate as the husband hath, she shall have dower. See Litt. § 53. As, then, the issue Mrs. Lamar might have had by the said Thomas might have inherited, she is entitled to dower. The widow of a tenant in tail, it was conceded, would be entitled to dower. And so, in my judgment, is the widow of a tenant in fee conditional at common law." Neither the court nor the counsel engaged appear to have referred to Buckworth *v.* Thirkell, nor to any of the cases in which the question had been considered. The court seem to have relied, for the correctness of their conclusion, solely upon the text of Littleton, and the result, which, in their judgment, was fairly deducible therefrom. The decree rendered was afterwards unanimously affirmed in the Court of Appeals.[1]

35. The case of Adams *v.* Beekman,[2] decided by Chancellor Walworth, in some of its features bears a strong resemblance to Barker *v.* Barker.[3] William Adams, by his will, devised the use of his farm to his son, the husband of the complainant, and to his nephew, for the term of three years. He directed his executors, at the expiration of that time, and as soon thereafter as could conveniently be done, to sell the farm, and divide the avails among his five children.

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[1] Page 645. [2] Adams *v.* Beekman, 1 Paige, 631. [3] Supra, § 29.

By a subsequent clause in the will it was provided that if any of his children died before the testator, leaving no children, the share of the child so dying should go to the survivors; and also, in case any of them should die after his (the testator's) decease, leaving no children, and not having disposed of his or her share of the estate, the same should likewise go to the survivors; but in case any of the testator's children died, leaving children, then such children were to take the share of their parent in the same manner as such parent, if living, would have taken the same. The son died within the three years, leaving children, and the complainant, his widow. It was held that she was not entitled to dower. "By the death of the son during the term," said the chancellor, "and before the executors were authorized to sell the farm and divide the proceeds, his interest was divested, and the executory limitation over to his children took effect. They are entitled to the share of the proceeds which would have belonged to him, if living. *They do not take as heirs of their father, but as contingent legatees under the will.* Their mother is not entitled to any part thereof, either as dower or under the statute of distributions."

In a later case the Supreme Court of New York refused to adopt what appears to be the prevailing doctrine of the decided cases, and dissented from the views expressed by Lord Mansfield in Buckworth *v.* Thirkell. A testator, by his will, which took effect prior to the Revised Statutes, devised as follows: "I give and devise to my two sons, Moses and Abraham, the farm I live upon, to have and to hold to them, their heirs and assigns forever, they supporting their mother thereon as above directed, and paying just debts and funeral expenses, to be divided as equal as may be, share and share alike. If either Moses or Abraham should die, and leave no lawful issue, then their portion or share of the land shall be equally divided between my son William, and the survivor of them." Moses died in 1850, leaving one child, and Abraham died in 1857, leaving a widow, but no issue. It was held that the limitation over to William was good as an executory devise; and that he was entitled to an estate in fee in the one-half of the land devised to Abraham exonerated from the dower of the widow of the latter. Upon this point the court remarked as follows: "The widow takes her estate through the husband, but not from him, like one who inherits, for he can do no act which will divest her right. And when the estate of the husband is determined by the happening of an event which defeats its further

continuance, the estate in dower must be determined with it. It is a part of the same estate of freehold and inheritance of which the husband was seized, and to the extent of it, is so much abstracted from what would otherwise descend to the heirs at law. Abraham Weller, by the express words of the will, took an estate in fee, but by subsequent words, which I think operative and effectual, it was made determinable upon his dying without issue at the time of his death. When that event happened, the wife's right to dower ceased with the estate out of which it could only proceed. This conclusion conflicts with Lord Mansfield's judgment in Buckworth *v.* Thirkell, (3 B. & P. 652.) It is the rule, however, given by Mr. Cruise in his treatise on the Law of Real Property, (tit. 6, Dower, ch. 3, § 33,) and is the rule maintained by Mr. Park with singular ability in his work on the Law of Dower, page 174."[1]

36. There seems to be a marked distinction between a case where, by the terms of the limitation, the husband takes a fee simple estate, which, if he have issue living at his death, will descend to such issue, and which is limited over only in the event of his death *without issue*, and other cases of conditional limitation. Such a case is closely assimilated, in principle, to the natural determination of the estate for want of heirs generally, and there would seem to be no good reason why the husband's estate should not be so prolonged as to give the right of dower in the one case as well as in the other, particularly as it is allowed to estates tail under similar circumstances, and also to conditional fees at common law. There seems to be an inconsistency in denying to the higher estate a right or interest which is annexed to the lesser.[2] Where the estate is defeasible by an event which has no relation to the death of the husband, but which may happen during the coverture, or at a period subsequent to his death, and which, therefore, might divest him of the estate during his lifetime, or deprive his issue of it after his death, it is manifest that the same reason for recognizing the claim of the widow does not exist. Indeed, to hold the wife dowable of such an estate after it was determined, would seem quite repugnant to principle. The infirmity in the estate of the husband exists at its inception. The issue take it subject thereto. Their estate, as well as that of the widow, is derived through the grant or devise to him, and is a

[1] Weller *v.* Weller, 28 Barb. 588.

[2] See observations of Vice-Chancellor Stuart, cited ante, § 30..

continuation of his estate; and if the estate of the heirs be defeated—as it clearly would be—by the happening of the event which determines that of the husband—how, upon principle, is the interest of the widow to be exempted from the same consequence? Indeed, it may be fairly inferred, from the remarks of Lord Mansfield in Buckworth *v.* Thirkell, that he was disposed to distinguish between these two classes of cases.[1] The principle settled where the husband possesses a power of appointment, and has determined his estate by the exercise of the power, would seem to accord with this view.[2] "An estate liable to be determined by a springing or shifting use, is not, in substance, distinguishable from an estate liable to be determined by the exercise of a power of appointment; the effect is the same, whether the new use is to arise on the execution of the power, or on any other uncertain event taking place. In either case it arises from the original instrument, taking effect, in point of time, from the period when the event happens; and since it has been settled that the right to dower is defeated by the appointment, it seems to follow that the same rule must prevail with respect to estates determined by shifting or springing uses."[3]

37. In all the reported cases in which dower or curtesy has been allowed upon estates of this character, the estate was such that the issue of the wife, had there been any, would have been entitled to take by descent. In the cases in which it was denied, the issue could not have taken by descent. This was the nature of the estate in Sumner *v.* Partridge,[4] and Barker *v.* Barker.[5] In both these cases, as shown by the opinion of the Vice-Chancellor in the latter case, the issue took under the original limitation, as purchasers, and not by descent. They did not receive their estate from the mother, but from the original donor.[6] The effect of this construction of the limitation is not to defeat the estate of the wife, but, in the event of her leaving issue, to convert it, *ab initio*, into an estate in herself for life, with remainder in fee to such issue. Viewed in this light, it is clear that the husband could not be tenant by the curtesy, as a mere life estate is not sufficient to give either curtesy or dower.[7]

38. In no case has it been held that where the limitation is of

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[1] Supra, § 21.
[2] See ante, § 9 *et seq.*
[3] App. No. II. by Jacob; 2 Roper, Husb. and Wife, 506, 507.
[4] Supra, § 19.
[5] Supra, § 29.
[6] Accord. Adams v. Beekman, 1 Paige, 631; supra, § 65.
[7] Post, ch. 17.

such character that the estate determines during the coverture, the wife is dowable. In order to sustain a claim to dower in such case, it would be necessary to hold that after the estate of the husband had ceased, and the party entitled under the limitation over had entered and enjoyed the premises, the former estate should partially revive upon the determination of the coverture by the death of the husband. This would appear to be totally irreconcilable with principle.[1]

In Flavill *v.* Ventrice,[2] the event which determined the husband's estate happened *after* his death, and the judges were equally divided upon the question as to whether his widow was entitled to dower.

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[1] Jacob's note, 2 Roper, Husb. and Wife, 502–7.

[2] Ante, § 18.

CHAPTER XV.

DOWER IN ESTATES IN REMAINDER AND REVERSION.

§ 1–6. The general doctrine.
7, 8. Lands subject to prior right of dower.
9–18. Rule where the estate comes by descent.
19. Rule where the estate is acquired by devise.
§ 20. Illustration of the doctrine.
21, 22. Release or extinguishment of the elder right.
23–26. Rule where the estate is acquired by purchase.

The general doctrine.

1. ESTATES in remainder or reversion, expectant upon an estate of freehold, are not subject to dower, unless the latter estate terminate during the coverture, so as to confer upon the husband the right to the immediate freehold. This is a well-established principle of the common law.[1]

2. In the United States the common law rule is generally adhered to, and it may be laid down as the American as well as the English doctrine, that no right of dower attaches upon reversionary estates.[2]

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[1] Supra, chap. 11, § 5; Co. Litt. 82, a.; Perk. secs. 339, 340; Park, Dow. 49, 53, 54; 1 Roper, Husb. and Wife, by Jacob, 359; 1 Greenl. Cruise, 162, § 8; 4 Kent, 38–40; 1 Washb. Real Prop. 154, §§ 5, 6.

[2] Eldredge *v.* Forrestal, 7 Mass. 253; Shoemaker *v.* Walker, 2 Serg. & Rawle, 554; Blood *v.* Blood, 23 Pick. 80; Fisk *v.* Eastman, 5 N. H. 240; Moore *v.* Esty, Ibid. 479; Williams *v.* Armory, 14 Mass. 20; Reynolds *v.* Reynolds, 5 Paige, 161; Safford *v.* Safford, 7 Paige, 259; Dunham *v.* Osborn, 1 Paige, 634; Bear *v.* Snyder, 11 Wend. 592; Green *v.* Putnam, 1 Barb. 500; Durando *v.* Durando, 23 N. Y. (9 Smith,) 331; S. C. 9 Amer. Law Reg. 630; Arnold *v.* Arnold, 8 B. Mon. 204; Northcutt *v.* Whipp, 12 B. Mon. 65; Apple *v.* Apple, 1 Head, (Tenn.) R. 348; Beardslee *v.* Beardslee, 5 Barb. 324; Weir *v* Tate, 4 Ired. Eq. R. 264; Blow *v.* Maynard, 2 Leigh, 29; Cocke *v.* Phillips, 12 Leigh, 248; Otis *v.* Parshley, 10 N. H. 403; Gardner *v.* Greene, 5 R. Is. 104; Watkins *v.* Thornton, 11 Ohio State R. 367, as to curtesy; Robison *v.* Codman, 1 Sumn. 121.

In Kentucky it is held that this principle does not extend to reversionary interests in slaves. Arnold *v.* Arnold, 8 B. Mon. 204; Northcutt *v.* Whipp, 12 B. Mon. 65.

It is elsewhere shown that an outstanding mere *chattel* interest is no impediment to dower, and the general proposition here stated is to be taken with that qualification.[1]

3. While it is true, as a general rule, that the determination or surrender of the prior estate during the coverture will enable the inchoate right of dower to attach,[2] yet it is to be understood that such determination or surrender must take place while the husband is seized of the estate in remainder or reversion. If he alien the inheritance during the existence of the particular estate, the right of the wife to be endowed is thereby entirely defeated.[3] The result is the same if the particular estate be not determined during the lifetime of the husband.[4]

4. In a case determined in Maine, the husband, while seized of a remainder expectant upon an estate for life, executed a mortgage of the premises in *fee*. He died during the continuance of the particular estate. Upon a proceeding for dower instituted by his widow against the mortgagee, who had entered and was in possession of the premises under the mortgage, while the general doctrine denying dower to estates in remainder was recognized, it was, nevertheless, decided, that as the mortgagee had taken and held possession under a conveyance which assumed to pass the entire fee simple estate, he was estopped to deny the seizin of the husband, and upon this principle the claim for dower was allowed.[5] But the New Hampshire courts have refused to extend this doctrine to cases where the tenant for life and the remainder-man have joined in a conveyance in fee. In one case arising in that State, in referring to Nason *v.* Allen, the court observed: "This case differs from the one now under consideration, inasmuch as the tenant here claims under a deed which was jointly executed by the husband and another; and though possession was taken under this deed, he claims and relies entirely on the title and possession of the other grantor, to an ex-

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[1] Chapter 11, §§ 5, 11, 12. See the authorities there cited.

[2] Vide chap. 11, §§ 13–15.

[3] Eldredge *v.* Forrestal, 7 Mass. 258; Williams *v.* Armory, 14 Mass. 20; Otis *v.* Parshley, 10 N. H. 403; Shoemaker *v.* Walker, 2 Serg. & Rawle, 554; Dunham *v.* Osborn, 1 Paige, 634; Gardner *v.* Greene, 5 R. Is. 104; Hughes on Writs, 149; Park, Dow. 54.

[4] See chap. 11, § 15; Dunham *v.* Osborn, 1 Paige, 634; Reynolds *v.* Reynolds, 5 Paige, 161; Weir *v.* Tate, 4 Ired. Eq. R. 264; Apple *v.* Apple, 1 Head, (Tenn.) R. 348; Perk. sec. 335.

[5] Nason *v.* Allen, 6 Greenl. 243.

tent that would preclude a right of dower on the part of the demandant. Such a joinder of different claimants, in a general conveyance, is of very frequent occurrence; and if the tenant, notwithstanding the general nature of the deed, may be considered as entering and holding in accordance with the several titles of the grantors, then there can be no estoppel, except to prevent the denial of such holding."[1]

5. The Massachusetts Colony law of 1641 expressly gave dower in estates in remainder and reversion. It was so construed, however, by limiting its operation to cases where the particular estate was less than a freehold, as to defeat the apparent purpose of the enactment.[2] In Ohio, by a recent amendatory act, dower is given in all real estate of which the husband, *at his decease*, held the fee simple in remainder or reversion. This provision, it is seen, is so worded as to enable the husband to convey the estate at any time during the coverture, free from dower. And a proviso annexed declares that dower shall not be assigned in such cases until after the termination of the prior estate.[3] The effect of this enactment is to change the common law rule requiring the particular estate to be determined during the coverture.

6. Mr. Crabb, in his work on Real Property, states that the Dower Act of 3 & 4 Will. IV., chapter 105,[4] has abrogated the rule of the common law excluding dower from estates in remainder and reversion.[5] "As by the Dower Act," he says, "seizin is not necessary

[1] Otis *v.* Parshley, 10 N. H. 403, 407.

[2] See 4 Dane, 664; Stearns' Real Act. 2d ed. 279; ante, ch. 2, § 6. The Maine statute of Feb. 19th, 1821, gave dower in estates "in possession, reversion, or remainder." Laws of Maine, (1821,) vol. i. p. 150, § 6. But this provision is no longer in force. See, also, Durham *v.* Angier, 20 Me. 242.

[3] Act of March 27th, 1858; vol. lv. Ohio Laws, 24; 1 Swan & Critch. Stat. 516, § 1. Judge Reeve is of opinion that the Connecticut statute, which allows dower only in such real estate as the husband dies *possessed* of, should be so construed as to embrace estates in remainder and reversion. "I apprehend," he says, "that the possession of any tenant, which is not an adverse holding to the husband, would be a sufficient possession of the husband to entitle the wife to dower; and that, in allowing dower to the widow, the precise technical meaning of the word *possessed* has been disregarded. I should, therefore, suppose that the wife would be entitled to dower in the reversion, when the lease was to B. for life; for such possession is not adverse to A." Dom. Rel. 57, 58. The editor of the second edition of Judge Reeve's work expresses the same opinion as to the construction to be given the Vermont statute. Ibid. note.

[4] See Appendix.

[5] 2 Crabb, Real Prop. 186; Ibid. 158; see, also, p. 182.

to give title to dower, that law can now apply only to women married before 1st January, 1834."[1] No reported case has yet appeared supporting this construction of the statute, and it may well be doubted whether it is the true construction. It would seem that the real purpose of the act was to dispense with a technical seizin of the legal estate as a requisite of dower, or to abolish the distinction between legal and equitable estates, and place them upon the same footing. Equitable estates are made subject to dower precisely as at common law legal estates were subject to that interest. But it has never been understood, at least in the United States, that equitable estates in remainder and reversion are subject to dower, unless made so by express statute, and in one reported case it was expressly held that they are not.[2]

Lands subject to prior right of dower.

7. *Dos de dote peti non debet*—"Dower ought not to be sought for out of dower"—is an old and familiar maxim of the law,[3] so closely related to the rule excluding dowęr from reversionary estates, that it is difficult to separate them. Indeed, the maxim may be regarded as the necessary and logical result of the rule itself, and as being founded upon the same principle.[4]

8. A case put by Lord Coke, to illustrate the proper application of this maxim, is as follows: "If there be grandfather, father, and son, and the grandfather is seized of three acres of land in fee, and taketh wife and dieth, this land descendeth to the father, who dieth either before or after entry: now is the wife of the father dowable. The father dieth and the wife of the grandfather is endowed of one acre and dieth; the wife of the father shall be endowed only of the two acres residue, for the dower of the grandmother is paramount the title of the wife of the father, and the seizin of the father which descended to him (be it in law, or actual) is defeated; and now upon the matter, the father had but a reversion expectant upon a freehold, and in that case *dos de dote peti non debet*, although the wife of the

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[1] 2 Crabb, Real Prop. 136.

[2] Shoemaker *v.* Walker, 2 Serg. & Rawle, 554.

[3] It prevailed in the time of Glanville. Glanv. Lib. 6, c. 17; 1 Reeves' Hist. Eng. Law, 102; 1 Greenl. Cruise, 164, § 20.

[4] Perk. sec. 315; Bac. Ab. Dower and Jointure, E.; Park, Dow. 154–6; 4 Dane's Abr. 671; D'Arcy *v.* Blake, 2 Sch. & Lefr. 387.

grandfather dieth, living the father's wife."[1] It is essential to a correct understanding of the point to keep carefully in view all the circumstances of the case, precisely as they are here stated. First: The lands come to the father by *descent.* Second: The widow of the *grandfather* survives the *father.* Third: Her dower is actually assigned her. Each of these particulars has a direct bearing upon the legal proposition presented by the learned author in the quotation above given.

1. *The lands come by descent.*

9. This is an important element in the case. Where lands are acquired by *purchase*, the rule is materially different, as will be explained hereafter.[2] Upon the death of the grandfather, the lands descended to the father, subject to the dower right of the widow of the former. In such case, upon endowment, the possession or seizin of the widow relates back and takes effect from the instant of the decease of the grandfather; her estate being, as already shown, a continuation or prolongation of the husband's estate.[3] It follows, that as to the lands assigned her in dower, she is seized by title paramount to that of the heir—the *father* in the case put by Coke—and that as to those particular lands, the intermediate seizin of the heir is defeated. The law, in such case, looks upon the intermediate seizin as having never existed, and the estate of the heir in the lands *so set apart*, is, by force of this principle, converted, as from the moment of the inception of his right, into an estate in reversion, expectant upon the life estate of the widow.[4] Here the rule holding reversionary estates not liable to dower, applies. As the father had

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[1] Co. Litt. 31, a. Substantially the same case is stated by Perkins, and numerous authorities are cited from the Year Books in its support. Perk. sec. 315.

[2] Infra, § 23 *et seq.*

[3] Supra, ch. 13, §§ 12–14; ch. 14, § 1.

[4] Perk. sec. 315; Park, Dow. 155, 156; Watk. on Desc. 65; 1 Washb. Real Prop. 209, § 10; 1 Hilliard on Real Prop. 2d ed. 135, § 50; 4 Dane's Ab. 664; Windham *v.* Portland, 4 Mass. 384, 388; Dunham *v.* Osborn, 1 Paige, 634; Reynolds *v.* Reynolds, 5 Paige, 161; Safford *v.* Safford, 7 Paige, 259; Matter of Cregier, 1 Barb. Ch. R. 598; Durando *v.* Durando, N. Y. Court of Appeals, 23 N. Y. (9 Smith,) 331; S. C. 9 Amer. Law Reg. 630; Leavitt *v.* Lamprey, 13 Pick. 382; Eldredge *v.* Forrestal, 7 Mass. 253; Beekman *v.* Hudson, 20 Wend. 53; Geer *v.* Hamblin, 1 Greenl. 54; Apple *v.* Apple, 1 Head, (Tenn.) R. 348; Potter *v.* Burchsted, (1773,) Story's Pl. 365, note.

a reversionary interest only in the part assigned to the widow of the grandfather, and, by operation of the doctrine of relation, had no seizin of the freehold in that portion during the coverture, the dower right of *his* widow is limited to the remaining two-thirds in which he was seized of the freehold or estate in possession, as well as of the inheritance.[1]

2. *The widow of the ancestor survives the heir.*

10. This is another material point to be observed. For, if the widow were to die during the lifetime of the heir, her estate would, of course, be determined, and the heir would thereupon become seized of the entire freehold and inheritance. But her death *subsequent* to the decease of the heir, though in the lifetime of *his* widow, would not give dower to the latter, for the reason before stated, that the particular estate must terminate during the coverture in order to render the widow dowable.[2] So if the heir part with his reversionary interest before the death of the ancestor's widow, the result is the same.[3]

3. *The dower of the ancestor's widow is actually assigned.*

11. This is also a requisite material to the application of the rule referred to. If there be no assignment of dower to the ancestor's widow, the seizin, or estate in possession which descended upon the heir, is not defeated to any extent, and consequently his widow is entitled to dower in the entire premises. It is immaterial, however, as shown in the case put by Coke, whether the assignment be made during the lifetime of the heir or after his decease. In either case, upon the principle already considered, the effect of the assignment, when made, is to convert the husband's estate in the portion assigned to the elder widow, into an estate in reversion *ab initio*, and, as a necessary consequence, to defeat the dower claim of *his* widow in that proportion of the premises.[4] This rule, however, is subject to

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[1] See authorities cited in preceding note.

[2] Ante, § 8, and authorities there referred to. But a distinction is taken, and the rule is different where the widow of the heir is actually endowed before the widow of the ancestor, and survives her. See the next section.

[3] Ibid.

[4] Park, Dow. 54, 157; 1 Cruise, Dig. tit. 6, ch. 8, §§ 22, 23; Hughes on Writs, 149; Hitchens *v.* Hitchens, 2 Vern. 405; Reynolds *v.* Reynolds, 5 Paige, 161; Saf-

a qualification that should be here noted. Where the widow of the heir has dower assigned her in the whole land *before* the widow of the ancestor has been endowed, whether such assignment was voluntary or obtained by suit, if the widow of the ancestor is subsequently endowed, the widow of the heir, after the death of the dowress whose right was paramount, will be entitled to be restored to her dower in the whole premises.[1] The reason of this diversity—to use the quaint language of Coke—is, because the junior widow "had in it an estate for term of *her* life, and the estate for the life of the grandmother is lesser in the eye of the law as to her than her own life."[2] Mr. Roper says, by way of elucidation of this anomalous distinction, that "by the endowment, the mother became *seized* of the legal freehold for her life; and the recovery of the acre by the grandmother did not defeat such estate *in toto*, but during her life only. The mother's estate for life, therefore, being, in relation to herself, a larger interest in consideration of law, than an estate *pur auter vie*, viz. during the grandmother's life, the mother retained a reversionary interest in the acre after it was recovered from her, expectant upon the grandmother's death, on the happening of which event, the mother is entitled to reclaim the acre in dower."[3]

12. Cases sometimes occur in which an *actual* assignment of dower is not deemed essential to the application of the maxim under consideration. These are ordinarily cases in partition, where conflicting claims to dower in the same lands arise, and where it is scarcely practicable to suspend the proceedings for the purpose of causing successive assignments to be made. In such cases the decree of the court establishing the right of dower in the elder widow, and directing it to be set off, is treated, in equity, as equivalent to an actual assignment, and is attended with the same consequences.

13. Dunham *v.* Osborn[4] was a case of this description. In that case partition was sought of lands which had formerly belonged to one Maxwell, and which were sold on execution against him, in his lifetime. One Dunham acquired two-thirds of the interest of the

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ford *v.* Safford, 7 Paige, 259; Elwood *v.* Klock, 18 Barb. 50; Robinson *v.* Miller, 2 B. Mon. 284, 288; Geer *v.* Hamblin, 1 Greenl. 54, 56; 4 Kent, 65; 1 Washb. Real Prop. 210.

[1] Co. Litt. 31, b.; Perk. sec. 316; Watk. Descents, 76 *et seq.;* 1 Roper, Husb. and Wife, by Jacob, 383 *et seq.;* In the Matter of Cregier, 1 Barb. Ch. 598, 602.

[2] Co. Litt. 31, b. [3] 1 Roper, Husb. and Wife, by Jacob, 383, 384.

[4] Dunham *v.* Osborn, 1 Paige, 634.

purchaser under the execution, and the defendant, Osborn, obtained the remaining third. Dunham and Maxwell both deceased. Upon the hearing it was admitted that the widow of Maxwell was entitled to dower in the entire premises, but it was insisted that the widow of Dunham had no claim of dower whatever, upon the ground that there could not be two rights of dower in the same premises, upon the seizin of two successive owners. The chancellor allowed Mrs. Dunham her dower in the share of her husband, but restricted it to the proportion not embraced in the dower right of Mrs. Maxwell. "The widow of Maxwell," he observed, "is entitled to have assigned for her dower one third of the premises, and Mrs. Dunham will be entitled to dower in two thirds of the reversion of that third, if she survives Mrs. Maxwell.[1] She is also entitled to dower in two thirds of the other two thirds of the premises from the present time."

14. Reynolds *v.* Reynolds[2] was of the same character, and the same principle was applied by the court. The doctrine was also there distinctly announced, that a decree of the court directing the dower of the ancestor's widow to be set off to her, is to be considered in equity as an actual assignment, and has the effect of disaffirming the intermediate seizin of the heir as fully and completely as an actual ouster of the possession. And this ruling was followed, and the subject fully discussed in the subsequent case of Safford *v.* Safford.[3]

15. A case was decided in the Supreme Court of New York in which the distinction already adverted to, between lands acquired by descent and lands obtained by purchase, was entirely overlooked. The court, in that case, upon a very cursory examination of the authorities, it would seem, recognized the right of dower in a reversion expectant upon the death of the elder dowress, although the lands had come to the heir by descent, charged with such dower.[4]

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[1] The allowance of dower in this reversion proceeded upon the distinction between the case of lands acquired by *descent* and lands acquired by *purchase*, which will be more particularly referred to presently. Infra, §§ 28–26. In the case cited, the husband of Mrs. Dunham took as a *purchaser*, and she, therefore, was dowable of the reversion.

[2] Reynolds *v.* Reynolds, 5 Paige, 161.

[3] Safford *v.* Safford, 7 Paige, 259. The doctrine here referred to was also applied by Chancellor Walworth In the Matter of Cregier, 1 Barb. Ch. 598, 602. And see Litt. sec. 54.

[4] Bear *v.* Snyder, 11 Wend. 592. See comments of Chancellor Walworth on this case, In the Matter of Cregier, 1 Barb. Ch. 598, 600.

But in quite a recent case, the Court of Appeals of that State, in express terms enforced the distinction between the two classes of cases.[1]

16. In most, if not all the States, provision is made by statute for the assignment of dower in the *rents and profits*, in cases where the premises are of such nature, or in such condition as not to admit of an assignment by metes and bounds. Whether the maxim, *dos de dote peti non debet*, is applicable where the assignment is in this form, does not appear to have ever been considered by the courts. In such case the tenant is not deprived of the possession of any portion of the estate; his seizin of the freehold is undisturbed. The widow, in lieu of dower in the lands, has an order or decree for the payment of an annual sum of money during her life, and this sum is made a charge or lien upon the entire premises. Hence, the estate of the tenant is not, in *fact*, converted into an estate in reversion in any part of the lands. It would seem, however, that the decree for dower, and its assignment in the rents and profits, should, in equity, and perhaps at law, be treated as equivalent to an assignment by metes and bounds, and the right of a second dowress be restricted accordingly. In Dunham *v.* Osborn, the chancellor directed that if a sale of the premises became necessary, the dower interest of the respective claimants in the purchase money should be estimated upon the same principles applicable to an assignment in the lands.[2]

17. The following case was decided in Mississippi: Certain lands of an intestate were sold by his administrators to A. Dower was allotted to the widow of the intestate, who also sold her interest to the same purchaser. A. died, leaving a widow. Upon a bill for foreclosure for a portion of the unpaid purchase money, filed by the administrators who made the sale, the widow of A. claimed dower in the dower interest purchased by him as above stated. It was held that the purchase of such dower inured to the benefit of the administrators, and that A.'s widow was not entitled to dower in the premises: first, because the interest thus acquired merged in the fee; and secondly, if the life estate could be considered as existing separately from the remainder, although united in the same person, still such an estate was not subject to dower.[3]

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[1] Durando *v.* Durando, 23 N. Y. (9 Smith,) 331; 9 Amer. Law Reg. 630.

[2] Dunham *v.* Osborn, 1 Paige, 634, 636. See In the Matter of Cregier, 1 Barb. Ch. 598; Leavitt *v.* Lamprey, 13 Pick. 382.

[3] Fisher *v.* Grimes, 1 S. & M. Ch. R. 107.

18. If the widow of the ancestor recover dower against the heir, or his widow, by erroneous judgment or decree, and the judgment or decree be afterwards reversed, it seems that the mesne seizin of the heir would be revived, and the widow of the latter be restored to her right of dower.[1] And although there had been no intermediate seizin, yet if the reversal occurred in the lifetime of the heir, the life estate of the ancestor's widow would thereby be avoided, and the reversionary estate of the heir be turned into an estate in possession. In this manner he would become invested with the freehold and inheritance in the entire premises, during the coverture, and the right of dower of his wife would attach accordingly.[2]

Lands acquired by devise.

19. The maxim, *dos de dote peti non debet*, applies, as well where lands are acquired by devise, as where they come by descent. The devisee is not a *purchaser* in the sense in which that term is here employed. This point was fully discussed and expressly settled, in the cases cited in the note.[3] But if the widow of the devisor make no claim for dower; or if she be barred of her dower in the particular lands by reason of devises or bequests contained in the will in lieu thereof, which she accepts, the widow of the devisee will be dowable of the whole lands.[4]

20. Judge Reeve has the following illustration of the operation and effect of the above maxim: If A. sells to B., and B. to C., and C. to D., and D. to E., and the husbands all die, leaving their respective wives living, the widow of A. is entitled to be endowed of one-third of the estate; the widow of B. is entitled to be endowed of one-third of what remains, after deducting the dower of the first wife; the widow of C. of one-third of what remains after deducting the dower of the wives of A. and B.; and so on to the wife of D.

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[1] Co. Litt. 15, a., n. 7; 7 H. 5, 4.

[2] Park, Dow. 157.

[3] Durando v. Durando, N. Y. Court of Appeals, 23 N. Y. (9 Smith,) 331; S. C. 9 Amer. Law Reg. 630, reviewing Cregier v. Osborne, 1 Barb. Ch. R. 598; Eldredge v. Forrestal, 7 Mass. 253. See also, Beekman v. Hudson, 20 Wend. 53; Robinson v. Miller, 2 B. Mon. 284, 288; Hitchens v. Hitchens, 2 Vern. 403; 1 Washb. Real Prop. 209, § 29.

[4] Geer v. Hamblin, 1 Greenl. 54, 56; Robinson v. Miller, 2 B. Mon. 284; Hitchens v. Hitchens, 2 Vern. 403; 1 Cruise, p. 153.

And if we suppose the estate to consist of nine acres, the wife of A. would be endowed of three acres; the wife of B. of two acres; the wife of C. of one acre and a third, and the wife of D. of one-third of the remaining two acres and two-thirds.[1]

Release or extinguishment of the elder right.

21. In some of the reported cases a distinction is taken between the case of a release of the elder right of dower to the grantee of the heir or devisee, before an actual assignment, but after a judgment for dower, and the case of a release before any judgment or decree is rendered. Thus, in Leavitt *v.* Lamprey,[2] the widow having the elder right sued for her dower, and obtained judgment against the tenant, and then released to him. Subsequently the widow having the junior right instituted proceedings and claimed dower out of the whole estate. But the court, notwithstanding the release of the elder claim, restricted her to dower in two-thirds of the estate. In Elwood *v.* Klock[3] the release was made after action brought, but before any judgment or decree. It was held that the release neither operated as an assignment of the dower, nor as a conveyance of it to the grantee; but that the right thereby became extinguished. In accordance with this view, dower in the entire premises was allowed to the junior widow.[4]

22. In Michigan it is provided by statute that where there are two claims of dower, and the prior right has been satisfied, with or without assignment, there shall be no dower to that extent during the lifetime of the first dowress.[5]

The doctrine where the estate is acquired by purchase.

23. To the paragraph before quoted from Lord Coke,[6] the following observations are added: "And here note a diversity between a descent and a purchase. For, in the case aforesaid, if the grandfather had *enfeoffed* the father, or made a gift in tail unto him, there, in the case above said, the wife of the father, after the decease of

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[1] Reeve's Dom. Rel. 58; 4 Kent, 64, note.

[2] Leavitt *v.* Lamprey, 13 Pick. 382.

[3] Elwood *v.* Klock, 13 Barb. 50.

[4] See, also, Atwood *v.* Atwood, 22 Pick. 283.

[5] 2 Comp. Laws Mich. 855, § 2802.

[6] Ante, § 8.

the grandfather's wife, should have been endowed of that part assigned to the grandmother; and the reason of this diversity is, for that the seizin that descended after the decease of the grandfather to the father, is avoided by the endowment of the grandmother, whose title was consummate by the death of the grandfather; but in the case of the purchase or gift, that took effect in the life of the grandfather, (before the title of dower of the grandmother was consummate,) is not defeated, but only *quoad* the grandmother, and in that case there shall be *dos de dote.*"[1]

24. In the foregoing case, the father, or, in other words, the grantee, becomes seized of the estate by virtue of the grant, *during the lifetime of the ancestor*, the grantor. The seizin thus acquired can not be defeated absolutely by the seizin of the ancestor's widow, which, even by relation, can be carried no further back than the instant of the ancestor's death, and which, therefore, would leave the seizin of the heir intervening between the date of the grant and the period of the ancestor's death, wholly unimpaired and undisturbed. Hence, if the grantee (the father, as the case is stated by Coke) were married at any time before the assignment of dower to the ancestor's widow,[2] the seizin thus existing would be sufficient to confer upon his wife a right of dower in the whole estate, subject only to the dower interest of the ancestor's widow. If the latter were endowed during the lifetime of the grantee, such endowment would operate as an *interruption* of his seizin in the particular lands set off, during the existence of her estate. If the grantee were to die during her lifetime, and after she had been endowed, then *his* widow would be dowable of the remainder of the estate, including the *reversion* of that portion before set off. If, before the assignment of dower to the ancestor's widow, the grantee should die, and his own widow be endowed, then the subsequent assignment of dower to the elder dowress would operate to interrupt the enjoyment of the other widow in a proportionate part, during the lifetime of the former, but no longer.[3]

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[1] Co. Litt. 31, a. and b.; accord. Perk. sec. 315.

[2] See ante, § 11.

[3] Park, Dow. 156; 1 Roper, Husb. and Wife, by Jacob, 382–4; 1 Cruise, Dig. 164; 4 Dane, Ab. 668; 1 Washb. Real Prop. 210, § 29; Bustard's case, 4 Co. 122, a.; Geer *v.* Hamblin, 1 Greenl. 54; Dunham *v.* Osborn, 1 Paige, Ch. 634; Durando *v.* Durando, 23 N. Y. (9 Smith,) 331; S. C. 9 Amer. Law Reg. 630; Manning *v.* Laboree, 33 Maine, 343; In the Matter of Cregier, 1 Barb. Ch. 598.

25. This point appears to have been involved in an early case found in the reports.[1] A grandfather gave lands to the father, in tail. The latter died, and his widow was endowed of the third part of the whole estate by his son. Afterwards the grandfather died, and *his* widow brought a writ of dower against the widow of the father. The latter vouched the son, by whom she had been endowed, and the question was as to how much she should recover against him in value; whether a third of two parts, or a third of the whole; it was adjudged that she should recover generally to the value which she lost, "for dower tolled the estate which by law descended, but not the estate acquired and gained by purchase."[2]

26. But even in a case of purchase, if the grantee do not marry until *after* the assignment of dower to the grantor's widow, the maxim, *dos de dote peti non debet*, applies, and this upon the principle already stated, that the assignment converts the estate of the grantee into an estate in reversion in the lands assigned.[3] As to those lands, he would have no seizin during the coverture, (unless the grantor's widow should die in his lifetime,) of the present freehold estate.

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[1] Paris's case, 5 E. 3, Vouch. 249; 4 Co. 122, a.

[2] Park, Dow. 156, 157. See, also, Co. Litt. 31, b.; Perk. sec. 316.

[3] Ante, § 11.

CHAPTER XVI.

DOWER IN ESTATES IN JOINT TENANCY, COPARCENARY AND COMMON.

§ 1–5. The rule at common law as to estates in joint tenancy.
6–12. Statutory modifications in the United States.
§ 13–17. Dower in estates in coparcenary and common.
18–33. Effect of sale in partition.

The rule at common law.

1. THE doctrine of the common law excluding dower from estates held in joint tenancy has already been adverted to.[1] It is thus stated by Littleton: "And it is to be understood that the wife shall not be endowed of lands or tenements which her husband holdeth jointly with another at the time of his death."[2] It is difficult to trace the origin of this rule. The earliest text-books in which it is laid down appear to be Fitzherbert's Natura Brevium and Rolle's Abridgment.[3] It is also found in the text of Brooke.[4] In the Natura Brevium, the 34 Edward I., "Dower," 179, is cited. Brooke cites and relies upon the 3d Henry IV., page 6; but all the treatises fail to give the particulars of these cases, or the reasoning upon which they were determined, stating simply the naked point decided. Chief Baron Gilbert has supposed the rule to be referrible to feudal principles: "In that case of joint tenancy," he says, "during the joint seizin, the wife's contract of dower can never attach upon the estate, because the other joint tenant comes in by the feudal contract, superior to the marriage contract; so to the wife's infeudation; for though the marriage contract had been prior to the joint tenancy, yet it will not attach upon it, because the estate in joint tenancy is

[1] Chap. 12, §§ 33–35.
[2] Litt. § 45.
[3] Fitzh. N. B. 147, (E.); Ibid. 150; 1 Roll. Abr. 676.
[4] Bro. Dow. pl. 30. The point is also decided as to curtesy, in Cowley v. Anderson, Toth. 33.

so created that it should survive. *Et cujus dare ejusdem disponere;* therefore, though the marriage were precedent, yet it can not take place upon this infeudation."[1] Lord Coke's explanation of the rule is in these words: "The reason of this diversity is for that the joint tenant, which surviveth, claimeth the land by the feoffment, and by survivorship, which is above the title of dower."[2]

2. So long as the rule is confined within the limits fairly implied in the text above quoted from Gilbert and Coke, the reasoning upon which it proceeds is very easily understood. As against the survivor, it is plain there can be no dower, because, from the very nature of the estate, and by virtue of the original grant, the entire interest becomes absolutely vested in him upon the death of the cotenant. The rule, however, as established, goes much further than this, and not only denies dower as against the survivor, but absolutely precludes it from attaching during the existence of the joint estate. The principle upon which this extreme doctrine rests is not entirely obvious. There is no essential quality in a joint estate necessarily incompatible with the existence of an inchoate dower interest, and by analogy to the cases of estates determinable by condition,[3] or by title paramount, it would seem perfectly consistent with principle to hold that the right of dower attaches upon such estate, subject only to be defeated by the survivorship of the cotenant of the husband.[4] But the doctrine of the common law is too well settled to be shaken at the present day;[5] and, indeed, is carried into the dower act recently adopted in England.[6]

3. One consequence resulting from this rule is, that if the husband sever the joint estate by conveying his share to a third person, the right of dower is thereby entirely defeated.[7] Ordinarily any act which determines the joint tenancy during the lifetime of the hus-

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[1] Gilb. Uses, 404.

[2] Co. Litt. 37, b.

[3] Supra, ch. 14, §§ 3–5.

[4] Park, Dow. 38.

[5] Litt. sec. 45; 1 Roll. Abr. 676; Fitzh. N. B. 147 (E.) and 150; Bro. Dow. pl. 30; Co. Litt. 31, b.; Cowley *v.* Anderson, Toth. 33; Sutton *v.* Rolfe, 3 Lev. 34; 1 Roper, Husb. and Wife, by Jacob, 367; Perk. sec. 334; Park, Dow. 37, 40; Watk. on Conv. 42; 3 Prest. Abstr. 367; Burton, Real Prop. § 353; 4 Kent, 37; Mayburry *v.* Brien, 15 Peters, S. C. R. 21; Hamblin *v.* Bank, &c., 19 Maine, (1 Appl.) 66; see ch. 12, § 33 *et seq.*

[6] 3 & 4 Will. IV., ch. 105, § 2. See Appendix.

[7] Fitzh. N. B. 150; Bro. Dow. pl. 30; Co. Litt. 31, b.; 1 Roper, Husb. and Wife, by Jacob, 367; Park, Dow. 39; 4 Kent, 37; Mayburry *v.* Brien, 15 Pet. 21; supra, ch. 12, § 33.

band, entitles the wife to dower; but it is held that where the joint estate is severed by the alienation of the husband, the sole seizin acquired by him in virtue of the conveyance is instantaneous only, and passes from him by the same act by which he acquired it, and, therefore, that no right of dower attaches.[1] Had a contrary doctrine prevailed, and dower been held to attach upon the joint estate, subject only to be defeated by survivorship, then, upon the determination of the joint tenancy by the alienation of the husband, and the consequent destruction of the possibility of survivorship, the right of the wife would become fixed, liable only to be defeated by her own act, or by her decease in the lifetime of the husband.

4. The rule denying dower to joint estates applies where either the life estate or the estate of inheritance is of that character. In order to confer dower, there must be a *sole* seizin, both of the freehold and of the inheritance.[2] Some instances of the application of this principle have been noticed in a previous chapter.[3] But a sole seizin of the freehold and inheritance, in any particular share of the lands, is sufficient to give dower in that share, even though the remainder of the estate be held by a joint seizin.[4]

5. Except where the joint estate is terminated by the alienation of the husband,[5] the rule is that any act which severs the joint tenancy, and clothes the husband with a sole seizin at any time during the coverture, entitles the wife to her dower.[6] And where the joint estate is severed by the conveyance of his share by one of the joint tenants, although *his* wife can not have dower in the portion conveyed, the principle of exclusion does not extend to the wife of the grantee. As to her the right of dower attaches immediately upon the taking effect of the conveyance.[7]

Statutory modifications in the United States.

6. In the United States very material changes have been made by statute in the common law relating to estates in joint tenancy. The

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[1] See ch. 12, § 33. [2] Park, Dow. 39, 40; supra, ch. 12, § 38.

[3] Ch. 11, § 32; ch. 12, § 33.

[4] Supra, ch. 12, § 38. For instances of a joint seizin rendered sole *ab initio*, so as to enable dower to attach, see ante, ch. 12, §§ 34, 35.

[5] See ante, § 3.

[6] Gilb. Uses, 404; Perk. sec. 337; Park, Dow. 40; supra, ch. 12 § 38.

[7] Litt. § 44.

right of survivorship is abolished in many of the States. In others, all estates limited to two or more persons are treated as tenancies in common, unless expressly declared to be joint tenancies by the deed or instrument creating them. An exception is commonly introduced in these statutes in respect of estates to joint trustees, and as to such estates the rule of the common law is preserved. The different statutory provisions upon this subject will be here noticed.

7. As early as 1783 a statute was passed in Massachusetts abolishing the principle of survivorship among joint tenants, and enacting that on the death of a joint tenant, the joint estate of which he was seized should descend to his heirs.[1] This statute was repealed and substantially re-enacted by an act passed in 1785, which declared that all estates which had been or should be aliened to two or more persons, should be deemed tenancies in common, unless it appeared to be the manifest intent of the alienor that they should be held as joint estates.[2] The statute now in force in that State is as follows:—

Sec. 13. All conveyances and devises of lands, made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy; unless it is expressed therein that the grantees or devisees shall take the lands jointly, or as joint tenants, or in joint tenancy, or to them and the survivor of them.

Sec. 14. The preceding section shall not apply to mortgages, nor to devises or conveyances made in trust, or made to husband and wife, nor to any devise or conveyance in which it manifestly appears, from the tenor of the instrument, that it was intended to create an estate in joint tenancy.[3]

8. Similar enactments have been adopted in Michigan,[4] Wisconsin,[5] Indiana,[6] Mississippi,[7] and Minnesota.[8] In Vermont mortgages are not excepted from the operation of the statute. In other respects the statute of that State conforms to the Massachusetts act.[9] In Rhode Island the right of survivorship is abolished except as to

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[1] Stat. 1783, ch. 52; Holbrook *v.* Finney, 4 Mass. 566, 568.

[2] Stat. 1785, ch. 62; Holbrook *v.* Finney, 4 Mass. 566, 567.

[3] Gen. Stat. Mass. (1860,) ch. 89, §§ 13, 14; Mass. Rev. Stat. (1836,) p. 406, §§ 10, 11; see Appleton *v.* Boyd, 7 Mass. 131; Goodwin *v.* Richardson, 11 Mass. 469; Miller *v.* Miller, 16 Mass. 59; Allen *v.* Holton, 20 Pick. 458; Putney *v.* Dresser, 2 Met. 583; Fowler *v.* Thayer, 4 Cush. 111; Stimpson *v.* Batterman, 5 Cush. 158; Webster *v.* Vandeventer, 6 Gray, 428.

[4] Comp. Stat. 1857, ch. 85, § 44.

[5] Rev. Stat. 1858, ch. 88, § 44.

[6] Rev. Stat. 1852, ch. 28, § 7.

[7] Rev. Code, 1857, ch. 86, § 4, art. 18.

[8] Comp. Stat. 1858, ch. 32.

[9] Comp. Stat. 1850, ch. 62, § 2.

devises or conveyances where the instrument manifestly indicates an intention on the part of the devisor or grantor to create an estate in joint tenancy.[1] In Maine, where the conveyance is by mortgage, or in trust to two or more persons, with power to appoint a successor in case one dies, it is construed a joint tenancy unless the contrary appear.[2]

9. In the following States the right of survivorship is abrogated in all cases except where the estate is vested in executors or trustees: New York,[3] Illinois,[4] Delaware,[5] Missouri,[6] Arkansas,[7] and California.[8] In Pennsylvania the exception is limited to the case of joint trustees.[9] In Alabama the statute is held by the courts not to apply to trust estates and estates in *auter droit*.[10] In New Hampshire,[11] New Jersey,[12] Maryland,[13] and Iowa,[14] the exceptions contained in the Massachusetts statute do not exist.

10. The *jus accrescendi* is also abolished in the following States: Georgia,[15] Tennessee,[16] Texas,[17] Florida,[18] and North Carolina.[19] In Virginia and Kentucky it is also virtually abolished, as, in those States, the share of each cotenant, at his death, descends to his heir, or may be devised by will. An exception is made, however, as to estates held by executors or trustees, or where the conveyance directs that the survivor shall take the share of the one dying.[20] A further provision is in force in Kentucky which declares that where any real estate or slave is conveyed or devised to husband and wife, unless a right by survivorship is expressly provided for, there shall

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[1] Rev. Stat. 1857, ch. 145, § 1; see Randall *v.* Phillips, 3 Mason, 378.

[2] Rev. Stat. 1857, ch. 73, § 7.

[3] Rev. Stat. 4th ed. vol. ii. 135, § 44.

[4] Comp. Stat. 1858, vol. ii. 959.

[5] Rev. Code, 1852, ch. 86, § 1.

[6] Rev. Stat. 1855, ch. 32, § 13.

[7] Dig. of Stat. 1858, ch. 37, § 9.

[8] Wood, Dig. 1858, p. 104, § 1, art. 380.

[9] Purdon's Dig. 8th ed. 1857, p. 458; see Bambaugh *v.* Bambaugh, 11 S. & R. 191.

[10] Code, 1852, § 1312; Parsons *v.* Boyd, 20 Ala. 112.

[11] Comp. Stat. 1853, ch. 135, § 2.

[12] Nixon, Dig. 1855, p. 127, § 34. By construction conveyances to husband and wife are excepted; Den *v.* Hardenbergh, 5 Halst. 42.

[13] Dorsey's Laws, 1st ed. p. 784, ch. 162; 1 Maryl. Code, p. 350, § 12; see Purdy *v.* Purdy, 3 Md. Ch. Decis. 547.

[14] Code, 1851, ch. 78, § 1206; Revision of 1860, chap. 95, art. 1, § 2214.

[15] Cobb, New Dig. 1851, pp. 293, 545.

[16] Code, 1858, § 2010.

[17] Oldham & White, Dig. 1859, p. 245, art. 1087.

[18] Thompson's Dig. 1847, p. 191, § 20.

[19] Rev. Code, 1854, ch. 43, § 2.

[20] Va. Code, 1849, ch. 116, §§ 18, 19; see Deloney *v.* Hutcheson, 2 Rand. 183; Ky. Rev. Stat. 1852, ch. 80, § 13, and ch. 47, § 14; Stanton's Rev. vol. ii. ch. 80, § 14.

be no mutual right to the entirety by survivorship between them, but they shall take as tenants in common, and the respective moieties be subject to curtesy or dower, with all other incidents to such tenancy.[1]

11. It is held that joint tenancy, with the common law incidents of that estate, never existed in Ohio. In the case of Sergeant *v.* Steinberger,[2] the court thus refer to this principle: "It has more than once been decided by the Supreme Court on the circuit, that estates in joint tenancy do not exist under the laws of Ohio. The reasons which gave rise to this description of estate in England never existed with us. The *jus accrescendi* is not founded in principles of natural justice, nor in any reasons of policy applicable to our society or institutions. But, on the contrary, it is adverse to the understandings, habits and feelings of the people." This doctrine has since been reaffirmed in the courts of that State.[3] The same principle has been settled in Connecticut.[4] And the right of survivorship is also disallowed in South Carolina.[5]

12. The impediment to dower created by the common law doctrine of survivorship does not exist, it would seem, in any case where the *jus accrescendi* is abolished either by express statute or as the result of judicial construction. This point was determined in Massachusetts under the statutes of 1783 and 1785,[6] and the same ruling has been made in other States.[7]

Estates in coparcenary and common.

13. Lands held in coparcenary and common are subject to dower. In the early case of Sutton *v.* Rolfe,[8] a claim for dower in lands held

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[1] 2 Rev. Stat. Ky. art. 4, ch. 47, § 14; Stanton's Rev. vol. ii. p. 22.

[2] Sergeant *v.* Steinberger, 2 Ohio Rep. 305; see, also, White *v.* Sayre, Ibid. 110.

[3] Miles *v.* Fisher, 10 Ohio Rep. 1; Tabler *v.* Wiseman, 2 Ohio State Rep. 207.

[4] Phelps *v.* Jepson, 1 Root, 48.

[5] 1 Brev. Dig. 435; see 1 Washb. Real Prop. pp. 406–409, and note; 2 Greenl. Cruise, *364, note.

[6] Holbrook *v.* Finney, 4 Mass. 566.

[7] Davis *v.* Logan, 9 Dana, 185; Weir *v.* Tate, 4 Ired. Eq. R. 264; Reed *v.* Kennedy, 2 Strobh. (S. C.) 67; James *v.* Rowan, 6 S. & M. 393; see 4 Kent, 37, note; 1 Washb. Real Prop. 157, § 9; 1 Hilliard, Real Prop. 2d ed. 568, §§ 43, 45, and note; McMahan *v.* Kimball, 3 Blackf. R. 13, note (2.) In Hamblin *v.* Bank, &c., 1 App. 66, the common law principle excluding dower from joint estates was recognized by the court. So in Mayburry *v.* Brien, 15 Pet. 21.

[8] Sutton *v.* Rolfe, 3 Levinz, 84.

in common was resisted upon the ground that the wife of a tenant in common was not dowable until after partition made; but the court overruled the objection, and gave judgment for the demandant. The doctrine of this case is now firmly settled, and the rule is that dower will be set off in common, unless during the lifetime of the husband his share has been set apart to him in severalty by partition, in which event the dower of the widow will be restricted to, and it is her right to have it assigned in the portion so set apart.[1] A voluntary partition, if the division be fairly made, and no fraud is practiced on the wife, will have the same effect, in this particular, as a partition by virtue of legal proceedings.[2] But in proceedings in partition, unless the wife be made a party, it is necessary, in order to limit her claim to endowment, that partition be actually made. Where she is not a party to the proceedings, she is not barred by a mere decree for partition which is not executed in her husband's lifetime.[3]

14. In Davis *v.* Logan,[4] certain parties made a parol partition of the estate which had descended to them from their ancestor. Lot eight, as designated in the plat of division, fell to John Logan, who was then married. He subsequently sold this lot to one Davis. Afterwards the whole estate was conveyed to William Logan, one of the heirs, in trust, to make sales. He conveyed lot eight, with certain other parcels, to the same Davis who had originally purchased from John, describing in the deed the boundaries of the entire tract, but without showing the particular location or extent of a portion of the parcels thus conveyed. After the death of John, it was held that his widow was entitled to dower out of lot eight in the tract sold to Davis.

15. In Rank *v.* Hanna,[5] the husband was seized in fee of an undivided interest in lands, which he sold, and the purchaser and his cotenant, in the husband's lifetime, made voluntary partition, and confirmed the same by deed. It was held that the widow might

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[1] Litt. sec. 44, 45; 1 Roll. Abr. 674; Perk. sec. 310; Park, Dow. 42, 158; Tud. Cas. 46; Potter *v.* Wheeler, 13 Mass. 504; Wilkinson *v.* Parish, 3 Paige, 653; Totten *v.* Stuyvesant, 3 Edw. Ch. 500; Dolf *v.* Basset, 15 John. 21; Jackson *v.* Edwards, 22 Wend. 498; Mosher *v.* Mosher, 32 Maine, 412; 1 Washb. Real Prop. 158, § 10; 1 Hilliard, Real Prop. 180, § 12. Mr. Dane refers to a case in which dower was allowed in $\frac{1}{1}\frac{2}{4}\frac{5}{0}$ of the great sheep pasture in Nantucket. 4 Dane's Abr. 674.

[2] 1 Hilliard, Real Prop. 180, § 12; Totten *v.* Stuyvesant, 3 Edw. Ch. 500. But see Rank *v.* Hanna, 6 Ind. 20; post, § 15.

[3] Wilkinson *v.* Parish, 3 Paige, 653.

[4] Davis *v.* Logan, 9 Dana, 185.

[5] Rank *v.* Hanna, 6 Ind. 20.

have her dower assigned out of the whole undivided estate as if no partition had been made.

16. It is held in New Jersey that a *parol* partition will not conclude the wife, even though made under such circumstances as will bind the husband; nor is the question affected by the fact that possession is taken in severalty under the partition, and maintained for a series of years. The widow is, notwithstanding, dowable of her husband's proportion of the whole land.[1]

17. If, after partition made of lands held in coparcenary, one of the coparceners be evicted by title paramount, he may recover a proportionate share of the premises set apart to the husband, discharged of the claim of dower. In such case the common estate is diminished by the eviction, and as the estate of the coparcener who recovers *pro rata* has relation to the time of the death of the ancestor, it follows that to the extent of his recovery the right of dower is overreached and defeated.[2]

Effect of sale in partition.

18. The statutes of most, if not all the States, provide for the sale of lands held in common, where, upon proceedings for partition, it is ascertained that a division can not be made without serious detriment to the estate. In such cases the money arising from the sale is brought into court, and distributed to the several tenants in common in proportion to their respective interests in the common property. From these statute regulations has sprung a question of great interest and importance, namely, whether a sale made in conformity thereto operates to divest the contingent right of dower of the wife of a cotenant, and to pass the entire estate absolutely to the purchaser; and if so, whether, for that reason, it is proper that the court under whose direction the sale is made, should require a portion of the husband's share of the proceeds of the sale to be invested for her benefit in case she should survive him, and her right thus become absolute.

19. Upon the first point, Vice-Chancellor McCoun, of New York,

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[1] Lloyd *v.* Conover, 1 Dutch. 47; Woodhull *v.* Longstreet, 3 Harr. 405. See, also, Lee *v.* Lindell, 22 Misso. 202, 206.

[2] Perk. sec. 810; Park, Dow. 153.

has twice expressed the opinion that a sale so made does not divest the inchoate right of dower,[1] and one ground upon which he bases this conclusion is, that the courts possess no power to compel the wife to accept a provision in money in lieu of her interest in, and consequent right to, the enjoyment of the land itself. "Where an actual partition is made," he observes, "it has not the effect of divesting the right, for the right remains unimpaired, though it attaches itself to the land set apart to the husband in severalty. But where a sale, instead of an actual partition is found to be necessary, it is supposed by the complainant's counsel that the right or interest of the wife, as well as the title of the husband, passes, and that the purchaser will hold the land free of dower. The statute in relation to partition proceedings has not so declared in terms; and if such had been the intention of the legislature, it appears to me there would have been some provision in the law for securing the fund or proceeds belonging to the husband, or some portion of it, at least, for the benefit of the wife in the event of her survivorship; but no such provision is made. Where there is an estate in dower, or by the curtesy, the statute is explicit in its directions, and the powers of the court are declared. (2 R. S. 325, § 50 to 55.) How can these provisions be applied to the case of a mere contingent or inchoate right? The practical effect, as it seems to me, would be rather ludicrous; since it would be converting a wife into a widow during the husband's life. Then, has the court power, independently of any statutory authority, to deal with the proceeds of the husband's share, and to compel him to make a settlement upon his wife, in the event of her surviving him, in lieu of her dower in the lands sold? Cases do frequently occur where the Court of Chancery has jurisdiction to control a husband in the exercise of his legal rights in respect to the wife's property until he shall make a settlement upon her; but in a case like the present, the control must be had over the wife, to compel her to accept a provision in money instead of the use of the land, which the law leaves to her own free choice. Here lies the difficulty; as the law stands, the court can not compel her to accept a settlement in lieu of dower, though it should undertake to coerce the husband into a settlement upon her. The statute in relation to dower expressly gives the wife an election in many cases, and the

[1] Matthews v. Matthews, 1 Edw. Ch. R. 565; Jackson v. Edwards, 7 Paige, 386, 390, 391.

sixteenth section (1 R. S. 742) is more explicit, that no act or deed, or conveyance, executed or performed by the husband without the assent of his wife evidenced by her acknowledgment thereof in the manner required by law to pass the estates of married women, and no judgment or decree, confessed by, or recovered against him, shall prejudice the right of his wife to her dower, or preclude her from the recovery thereof. How, then, can the courts say that the act of the husband in subjecting his wife to a partition suit, or that a judgment or decree rendered therein without her assent evidenced in the manner pointed out, is to have the effect of barring her right; or that she shall accept a pecuniary or any other provision in lieu of her dower? Her assent appears to be absolutely necessary; and if she is competent in law, and willing to give such an assent, let her give it by uniting with her husband, in a release duly executed and acknowledged. It is, after all, a conventional matter between them, whether she has been made a party to the suit or not."[1]

20. Upon appeal, the Chancellor (Walworth) was of a different opinion. "That it was the intention of the revisers," he observed, after referring to certain amendments to the act relating to partition, "to enable the courts to give to a purchaser under the judgment or decree, when a sale of the premises was found to be necessary, a perfect title as against every future or contingent interest in any undivided share of the property, is evident from the note which they appended to the new provisions introduced by them in relation to incumbrances on such shares. Indeed, without such a power, it would be very difficult to make the partition equal in the case of a sale; as a contingent right of dower or other defect in the title as to one share in the property must, upon a sale, necessarily diminish the amount bid for all the shares collectively. The same difficulty, therefore, would exist in determining the value of a wife's inchoate right of dower in the undivided share of her husband, for the purpose of dividing the proceeds of the sale among the different tenants in common according to equity, as is apprehended by the counsel to exist in making a suitable provision for this contingent right of the wife, out of the whole of the proceeds of her husband's share of the sale, if she chose to insist upon her right to such a provision. And, in addition to that, the fact that the title in the hands of the purchaser

[1] Jackson *v.* Edwards, 7 Paige, 391, 392. See, also, the reasoning of the Vice-Chancellor in Matthews *v.* Matthews, cited *supra*.

would be incumbered with a contingent right of dower of a feme covert, in an undivided share of the premises, which might subject the owner to future expense and litigation, would diminish the value of the property in the hands of the purchaser to more than double the actual value of such contingent right. I can not believe that the legislature intended to leave this contingent interest, or inchoate right of dower of the wife of a tenant in common, an incumbrance upon the title in the hands of a purchaser, any more than that it was intended that a similar contingent interest of the husband in the wife's property should remain an incumbrance thereon. Although the husband has a present interest in his wife's real estate from the time of the marriage, for the joint lives of himself and wife, he is not even a tenant by the curtesy initiate, so as to give him an estate for his own life in the premises, until the birth of issue. And I believe it has never been doubted that a sale in a partition suit, to which he was a party, either under the act of 1813 or under the provisions of the revised statutes, would have the effect, not only to divest his present estate in the property during the joint lives of both, but also to bar his contingent interest in the property for the remainder of his life, after the death of his wife, in case he should afterwards have issue and survive her. Yet I have not been able to find any provision in the revised statutes which can reach such a case which is not equally applicable to the wife's inchoate right of dower in the husband's estate."[1]

21. The Chancellor also referred to the provisions of the revised statutes to show that it must have been the intention of the legislature to bar all future and contingent rights in the premises by a sale in partition, so as to give a perfect title to the purchaser: "The fifth section of the title of the revised statutes relative to the partition of lands, (2 R. S. 318,)" he said, "requires the plaintiff, in his petition, to set forth the rights and titles of all persons interested in the premises, so far as is known to him, including the interest of any tenant for years, for life, by the curtesy, or in dower, and the persons entitled to the reversion, remainder or inheritance after the termination of any particular estate therein, and every person who, by any contingency contained in any devise, grant, or otherwise, may become entitled to any beneficial interest in the premises. This language is certainly broad enough to include the contingent right of

[1] Pages 406–8.

dower of the wife of one of the tenants in common, as well as other future or contingent interests. And the next section authorizes every person having such an interest as is mentioned in the fifth section, whether the same is in possession or otherwise, and every person entitled to dower in such premises, if the same has not been admeasured, to be made a party to the suit. The special provision in relation to dower was inserted in this section to reach the case of a dowress who was entitled to an estate as tenant in dower in the whole premises; as the Supreme Court had decided that the provisions of the revised law of 1813 did not reach the case of a dowress whose husband was not a tenant in common of an undivided share of the estate. (See Coles *v.* Coles, 15 John. Rep. 319.) The language of the seventh, tenth, eleventh, twelfth and thirteenth sections of this title as originally passed, is equally comprehensive with the fifth; and show that it was the intention of the revisers and of the legislature that the owner of every future and contingent interest, whether known or unknown, as well as the owners of the present interests, should be made parties to the suit; and that their several rights and interests should be ascertained and settled by the court before a judgment or decree for a partition or a sale of the premises should be made. By the 61st section, the conveyance which is directed to be executed by the commissioners, under a judgment for sale of the premises, is declared to be a bar both in law and equity against all persons interested in the premises *in any way*, who shall have been named as parties in the proceedings; and as against all such persons or parties as were unknown, if notice of the application for partition shall have been given by publication as directed by the statute; and as against all other persons claiming from such parties, or either of them. And by the 84th section, the same force and effect is given to a master's deed, under a sale by virtue of a decree of this court. I am, therefore, compelled to declare that the opinion of the Vice-Chancellor in this cause, and in the case of Matthews *v.* Matthews, (1 Edw. Ch. Rep. 565,) as to the effect of a sale in partition upon the inchoate right of dower of the wife of a tenant in common, who has been made a party to the suit in conjunction with her husband, is erroneous; and that a purchaser under the judgment or decree will be protected against any future claim on her part, both in equity and at law."[1]

[1] Pages 410, 411.

22. The Chancellor also held, contrary to the opinion expressed by the Vice-Chancellor, that the court was authorized, and indeed required, to ascertain the present value of the wife's contingent right of dower in the husband's share of the proceeds of the sale, and to direct it to be invested for her benefit. This, he appeared to think, was the necessary result of his conclusion, that by the sale, the lands became discharged of her dower. His views upon this point are thus stated: "If, in either case, there should be such a disagreement between the husband and the wife as to render it necessary for the court, in providing for the legal rights of each, to settle their proportion of the proceeds of the sale, and if there was no other way to protect their rights than to ascertain the present value of the contingent interest of the husband or wife in such proceeds, it would be much easier to ascertain the present value of the wife's contingent right of dower than to ascertain the value of the husband's chance of becoming a tenant by the curtesy, not only by surviving his wife, but also by becoming the father of a child by her. Indeed, the annuity tables have furnished the court with the means of ascertaining the probable value of the wife's contingent right of dower during the life of the husband. These tables show the value of annuities which depend, not only upon the continuance of single lives of different ages, but upon the continuance of two or more joint lives. The proper rule for computing the present value of the wife's contingent right of dower, during the life of the husband, is to ascertain the present value of an annuity for her life, the value of a similar annuity depending upon the joint lives of herself and her husband; and the difference between those two sums will be the present value of her contingent right of dower. (McKean's Pr. L. Tables, 23, § 4; Hendry's Ann. Tables, 87, Prob. 4.) Should it be necessary, in the case of an infant, or an adult wife, for the court to protect her contingent right of dower upon a sale under a decree in partition, where the value of the husband's undivided share of the estate was such as to render it proper, the present value of that contingent right may be ascertained in that manner. And the amount may be invested in the trust company, or in a savings' bank, in the name of the register, to accumulate for her benefit during the joint lives of herself and her husband; so that the whole accumulated fund may then be paid over to her, or her personal representative, at that time, in full of her share in the proceeds of the sale. Her rights may also be effectually protected by directing the whole proceeds of the husband's

share to be paid to him, upon his giving security to the register or clerk, that the interest or income of one third of such proceeds shall be paid to his wife after his death, during the term of her natural life, if she survives him."

23. "Although," he adds, "the revised statutes have given specific directions as to the mode of ascertaining and securing the shares of the proceeds belonging to the tenants in dower and by the curtesy, and other tenants for life having present estates in possession in the premises, there is still a large class of future estates, both vested and contingent, in lands which may be sold under judgments and decrees in partition, that are not embraced in those specific directions. In all such cases it will be the duty of the court to ascertain and settle the value of such future estates and interests upon just and equitable principles, and to make such order as may be necessary for the protection of the shares of the fund which may belong to the persons who then are or may thereafter be, the owners of such future estates or interests, in analogy to the express provisions of the statute relative to the shares of parties who have present estates for life in possession. I can not, therefore, concur in the opinion of the Vice-Chancellor, that the neglect of the legislature to make a specific provision for the ascertainment of the value of the wife's contingent right of dower, and to secure the same for her benefit, is any evidence that it was intended to leave that, or any other future or contingent interest of a party to the suit, as an incumbrance upon the title of a purchaser under the judgment or decree."[1]

In conformity to these views an order was made requiring the wife's contingent interest in the fund arising from the sale, to be secured to her.[2] The case, however, was subsequently carried to the Court of Errors, and was finally decided on other grounds, the members of that court differing upon the question as to whether the inchoate right of dower was divested by the sale.[3]

24. In Wilkinson *v.* Parish,[4] pending proceedings for partition, one of the parties died. The Chancellor held that in order to make a perfect title to a purchaser, in case it became necessary to sell the premises, the widow of the deceased tenant in common must be made a party. "The widow," he said, "does not take her dower as the

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[1] Pages 408–10. [2] See page 418.
[3] Jackson *v.* Edwards, 22 Wend. 498.
[4] Wilkinson *v.* Parish, 3 Paige, 653.

representative of the husband, or by descent from him. She takes it by a title which is prior in point of time, to the commencement of this suit, and which can not be affected by any act of the husband, or by any proceedings in a suit to which she was not a party. By the marriage, the wife becomes entitled to a life estate in one third of the real estate of the husband, after his death, provided she survives him. She is therefore in the situation of a contingent remainder-man whose estate becomes vested by the death of a party to the suit upon whose death without issue the contingency depends. . . . In the case of Wilde *v.* Jenkins, which came before this court in March last, upon an application to overrule, as frivolous, a demurrer of the widow to a bill of revivor filed against her, it was decided that the wife's right to dower could not be affected by a suit against her husband to which she was not a party." So in Van Gelder *v.* Post,[1] it was held by the Vice-Chancellor that a sale in proceedings at law for partition, where the wife is not a party, will not bar her right of dower. "It appears to me impossible," he said, "that such a proceeding can bar her dower, any more than a simple alienation by the husband would have done. It is true that the statute declares the sale and conveyance by the commissioners to be a bar against the owners and all persons claiming by, from, or under them, or any or either of them;[2] yet it could not have been intended to affect a wife's right to dower—who, according to my understanding of the law as it exists, and always has existed in this State, can not be deprived of this right except by a voluntary act of her own."[3]

25. The following case, bearing, in some degree, upon this subject, was determined in Maryland: The wife of one of the joint owners of lands united with her husband as complainant in a bill for partition. The property was sold under a decree upon such bill. It was held that the purchaser took the lands discharged of dower. "It is by no means certain," the court remarked, "even prior to the act of 1839, ch. 23, a sale under such a decree for partition would not bar a '*potential*' or inchoate right of dower in the wife of one of the joint owners of the land. But conceding that such a sale would not have barred her right to dower in the property after her hus-

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[1] Van Gelder *v.* Post, 2 Edw. Ch. 577.

[2] 1 Kent & Radcliff's ed. Laws, 542.

[3] Accord. Lambert on Dower, 143. For the present New York statute regulating sales in partition where there is an inchoate dower interest in the premises, see post, § 30.

band's decease, if the sale had taken place before the act, there can be no doubt that under like circumstances occurring since the year 1839, she can not demand dower of the purchaser, inasmuch as the act referred to provides that a decree may be passed directing a sale of land, or real estate held jointly, or in common by two or more persons, and that a sale under such a decree shall pass to the purchaser all the interest and estate of all persons who are parties to the suit, either complainants or defendants; and also further provides that 'if any feme covert, by marriage with one of the joint tenants, or tenants in common, shall have acquired a potential right of dower in part of the estate to be sold, such right of dower is hereby expressly declared to be within the power of the court or judge to decree the sale, she being made a party to the proceedings, either complainant, or defendant.' . . . When the sale was made and ratified, any inchoate or possible dower right of Mrs. Warren in the land, to which she may previously have been entitled, was transferred to the proceeds of the sale, out of which the court had full power to provide for any legitimate claim on account of dower. And if the proceeds were not correctly distributed by the court, the purchaser would not be held responsible for an error of that kind."[1]

26. In Missouri it has been held that a widow's dower is divested by a sale in partition during the coverture, although she is not joined with her husband as a party. "It may be," the court said, "that as between the husband and wife the law should have provided some security for her dower out of the proceeds of the sale, but that such failure should be visited on the purchaser, would be a great hardship. The omission to make it could, on no principle, vary the nature of the proceeding, and make that of no force which was before binding."[2]

27. This question was also recently considered in Ohio. A sale had been made on proceedings in partition, and after the death of one of the cotenants, his widow instituted proceedings for dower against the grantee of the purchaser at the sale. The statute regulating the partition of lands in Ohio, in force at the time the sale was made, differed materially from the New York statute before referred to. The latter act, as has been seen, required all persons

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[1] Warren v. Twilley, 10 Maryl. 89.

[2] Lee v. Lindell, 22 Misso. 202, Leonard, J., dissenting; S. P. Sire v. City of St. Louis, Ibid. 206.

having any *contingent* interest in the premises to be made parties to the proceeding.[1] The Ohio statute, on the other hand, simply directed that each joint tenant, coparcener, or tenant in common, and any *widow* entitled to dower in the lands should be made defendants to the petition.[2] The statute did not require, nor in the case referred to had the *wife* been made a party to the proceeding in which the sale was made. The court, nevertheless, held that the inchoate right of dower was extinguished by the sale.[3]

28. "The question before us," the court observed, "is one of legislative intention. Did the General Assembly, in providing for the sale of estates in proceedings in partition, intend that the entire estate should pass to the purchaser divested of a wife's inchoate right of dower? In seeking for the intention of the legislature on this point, and in the absence of any clear and decisive expression of that intention in the language of the statute, it seems to us that the maxim, *argumentum ab inconvenienti plurimum valet in lege*, very properly and forcibly applies; for, 'if the words used by the legislature have a necessary meaning, it will be the duty of the court to construe the clause accordingly, whatever may be the inconvenience of such a course. But unless it is very clear that violence would be done to the language of the act by adopting any other construction, any great inconvenience which might result from that suggested may certainly afford fair ground for supposing that it could not be what was contemplated by the legislature, and will warrant the court in looking for some other interpretation.' Broom's Legal Maxims, 140, 141.

"To apply this maxim to the case before us, let us suppose two coparceners, each the owner of an equal undivided half of an estate inherited from a common ancestor. One of them has a wife; the other is unmarried. One of them petitions for partition of the common estate, which is found to be incapable of actual partition, and is ordered to be sold. It is understood to be the settled law that the inchoate right of dower of the wife is not divested by the sale. The consequence is, inevitably, that the estate must be sold for much less than it would otherwise have brought. Yet, on the distribution of

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[1] Vide opinion of Walworth, Chancellor, cited ante, §§ 20, 21.

[2] Act of February 17, 1831, 29 Ohio Laws, 254; Swan's Stat. ed. 1841, p. 613, sections 2, 13.

[3] Weaver v. Gregg, 6 Ohio St. R. 547.

the proceeds of the sale, the husband comes in for an equal share; and the loss consequent on the existence of the contingent incumbrance, falls alike on the unmarried and married coparcener. This is a necessary result, and it is not only inconvenient, but grossly unjust; too inconvenient and too unjust to permit us to suppose it to have entered into the intention of the legislature.

"We are of opinion, therefore, that it was the intention of the legislature, by a sale in partition, to divest the wife of her inchoate right of dower. In so holding, we do not subject this right at all to the will or caprice of the husband. The sale is the act of the law, designed to do justice to joint owners, and render estates available, and put forth only when, from the fact that the estate is incapable of actual partition, the necessities of the case require it. The legislature has deemed it more important to the public interest to render estates available to their owners without sacrifice of their value, by a sale, in case of necessity, than to preserve in all cases whatsoever, the wife's remote and contingent interest, at the expense of parties on whom she can have no proper claim.

"On the whole," they add, "our view of the question is this: The right of dower in the wife subsists in virtue of the seizin of the husband; and this right is always subject to any incumbrance, infirmity or incident, which the law attaches to that seizin, either at the time of the marriage, or at the time the husband became seized. A liability to be divested by a sale in partition, is an incident which the law affixes to the seizin of all joint estates; and the inchoate right of the wife is subject to this incident. And when the law steps in and divests the husband of his seizin, and turns the realty into personalty, she is, by the act and policy of the law, remitted, in lieu of her inchoate right of dower in the realty, to her inchoate right to a distributive share of the personalty into which it has been transmuted."

29. This reasoning addresses itself to the understanding with great force and cogency, and tends strongly to support the conclusion to which the court arrived. In the case supposed by the court, the injury resulting from a sale, subject to the contingent right of dower of the wife of one of the cotenants, is very evident. At the same time it does not seem perfectly clear that, from these admitted premises, a general rule should be deduced which is to be made applicable to all cases alike. In many cases the inequality suggested by the court has no existence in fact. The argument, *ab*

inconvenienti, applies with much force, where a part, only, of the coparceners are married, but in the view taken by the court, this maxim would seem to have no application, if the parties, in this respect, all stand upon an equal footing. The mind instinctively feels that it is a hardship upon the wife to deprive her of her right of dower against her consent, and without any fault on her part, even though the deprivation be the result of a purpose to do justice to another. Nor can we entirely divest ourselves of the impression that thereby the rights of one person are sacrificed, in order that those of another—in no degree, perhaps, more meritorious—may be protected and preserved. Where there is no inequality in respect of the coverture of the parties, the rule divesting the wife of her dower would seem to operate still more harshly. And it may be remarked that instances may not unfrequently occur in practice where a cotenant would be subjected to the consequences of a depreciation produced by a sale of the common property subject to an inchoate right of dower, and where it would hardly be claimed that such right was impaired by the sale. For example, if two coparceners, one of them married and the other unmarried, should unite in a mortgage of their lands, the wife not joining, and the premises were afterwards brought to sale by proceedings in foreclosure, the interest of the unmarried coparcener would be affected by the contingent incumbrance precisely in the same manner as in the case supposed by the court in Weaver *v.* Gregg. So if the joint estate were taken in execution and sold for the satisfaction of a joint debt. The liability to depreciation for this cause seems an inseparable incident of estates held in coparcenary or common.

30. It is manifest, however, that in proceedings in partition, the interests of all parties would be promoted by a sale free from the incumbrance of dower. An uncertain and contingent interest of this character would undoubtedly affect the market price of the property to an extent greatly disproportioned to the actual value of that interest. This consequence may be avoided, and the rights of all parties preserved, by extending to the wife, in all cases where she desires it, the protection suggested by the chancellor in Jackson *v.* Edwards.[1] Upon this point, the court, in Weaver *v.* Gregg, were not called upon to make any order, as that case was a simple proceeding for dower in the *lands*, instituted at a period long subsequent to the sale and

[1] Supra, §§ 22, 23.

the distribution of its proceeds. The opinion of the court, however, contains what may be construed to be an intimation against the propriety and legality of the course pointed out by Chancellor Walworth. After observing that the statute under which the sale was made directed that the proceeds of the sale should be distributed by order of the court in which the proceeding was had, to and among the several parties entitled to receive the same, in lieu of their respective parts and proportions of the estate or estates, according to their just rights and proportions, they add: "Now, in case of a sale as provided for in this statute, where the husband is the owner of the fee, and the wife has but a contingent right of dower, how, and to whom, is this distribution of the proceeds of the sale of the estate made? Always, in practice, so far as we know, it is made to the husband, and to him alone. And we think properly; for he is the sole representative of the estate. She has a contingent possibility of interest in it, which may be released, but no property, no actual interest in it which is the subject of grant or assignment. *Miller's Administrator* v. *Woodson*, 14 Ohio Rep. 518. Nor is the value of her possible and contingent interest capable of estimate with any degree of accuracy. *Moore* v. *Mayor, etc. of New York*, 4 Selden, 110. And, on this point, we may consider the rule of distribution as settled by the universal and unvarying practice."[1] This reasoning would seem to apply, with equal propriety, to any contingent interest. A contingent remainder is no more the subject of grant than a contingent right of dower. And its value is equally incapable of accurate estimate. But it is hardly to be supposed that for this reason a court of equity, upon a sale of real property under its direction, would wholly disregard an interest of that character. The present value of a contingent right of dower would seem to be just as capable of ascertainment as the present value of the absolute right after the death of the husband. In either case the estimate depends mainly upon results to be derived from tables of mortality, and in either case, also, these results are equally problematical.

31. That the difficulties attending an estimate of the present value of an inchoate right of dower are not regarded as insuperable, is evi-

[1] In accordance with the opinion here expressed, it was held by the Superior Court of Cincinnati (General Term, Oct. 1862) that, upon a sale of lands in partition, the inchoate dower interest of the wife of one of the joint owners is not only divested, but that she is not entitled to have any portion of the fund invested for her benefit. Pullen v. Shillito, opinion per Hoadley, J.

dent from the fact that in several of the States express provision is made by statute for the protection of the interest of the wife in cases of sales in partition during the lifetime of the husband. The New York statute of 1840 is as follows:—

In all cases of sales under judgment or decree in partition, where it shall appear that any married woman has an inchoate dower right in any of the lands divided, or sold, or that any person has any vested or contingent future right or estate in such lands, it shall be the duty of the court under whose judgment or decree such sale is made, to ascertain and settle the proportional value of such inchoate, contingent, or vested right or estate, according to the principles of law applicable to annuities and survivorship, and to direct such proportion of the proceeds of the sale to be invested, secured, or paid over in such manner as shall be judged best to secure and protect the rights and interests of the parties.[1]

The same act also provides for the release, by any married woman, to her husband, of her interest in the fund, and upon such release being made, directs that her share of the proceeds of the sale shall be paid to her husband. And such release, and also the payment, investment, or otherwise securing any share of the proceeds of the sale, according to the first section of the act, operates as a bar, both in law and equity, against any such right, estate, or claim.[2]

32. In Bartlett *v.* Van Zandt,[3] which arose under the foregoing act, the decree was so framed as to ascertain at once and definitely, the whole value of the dower interest of the wife of one of the parties. It directed the value of the inchoate right to be settled by a master, on the principle of life annuities, and that the amount thus ascertained should be paid into court from the proceeds of the sale, to be invested under the direction of the court. The income arising from this sum was to be paid to the assignees of the husband's interest, during the life of the husband,[4] and after his death the principal was to be paid as the court should direct. The husband survived the wife. It was held that the value thus ascertained represented the *present* worth of the wife's dower right, and that the sum paid or reserved on account thereof, became her absolute property without condition or contingency; that the sale operated as a statutory

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[1] Laws of 1840, ch. 177, § 1; 3 Rev. Stat. N. Y. 5th ed. p. 614, § 65.

[2] §§ 2, 3; 3 Rev. Stat. 5th ed. p. 614, §§ 66–68.

[3] Bartlett *v.* Van Zandt, 4 Sandf. Ch. 396.

[4] Compare the statement of the case, (p. 397,) where it is said the income was to be paid to the assignees during the life of the *wife*, with the opinion of the court, (p. 399,) where it is stated, no doubt correctly, that the assignees were to receive the income during the life of the *husband*.

conversion, impressing upon the sum payable to the wife for her dower interest, the character of personalty, and that upon her death it went to her husband.

Statutes similar to that of New York have been adopted in Minnesota and Virginia.[1]

33. In England, when it became established that estates in joint tenancy were not subject to dower, one of the modes devised by conveyancers to intercept that right, was to convey lands in such manner as to create, technically, an estate in joint tenancy in the husband.[2] If it be once settled that sales in partition completely extinguish the wife's right of dower, it will not be difficult, in the transmission of titles to real property, to frame conveyances with reference to this doctrine, and in a great measure practically nullify existing statutes securing the right of dower. If the courts, in the absence of legislation upon the subject, possess no power to protect the inchoate interest of the wife, a due regard to her rights would seem to require a prompt exercise of the legislative authority in all those States in which provision has not already been made for the protection of that interest in cases of the character here referred to.

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[1] Stat. Minn. (1858,) p. 602, §§ 86, 87. See, also, p. 599, § 12. Code of Va. (1849,) p. 474, § 8. The Maryland Code also provides for the sale of the lands of joint owners free from dower; vol. i. p. 78, § 33; and see ante, § 25.

For a discussion of the question relating to the right of the wife to have her inchoate dower interest protected where lands are sold in the husband's lifetime under proceedings in foreclosure, or to satisfy a vendor's lien, see ch. 23, §§ 26–30, and ch. 25, § 7.

[2] Park, Dow. 83.

CHAPTER XVII.

DOWER IN ESTATES NOT OF INHERITANCE.

§ 1–5. Rule at common law as to estates for life.
6–9. Rule in the United States.
§ 10–18. Dower in estates for years.
19. In estates at will.
20, 21. In wrongful estates.

At common law estates for life not subject to dower.

1. An estate for life, although possessing all the dignity of a freehold estate, is, nevertheless, by the rules of the common law, not subject to dower. It is obvious that dower does not attach upon an estate which the husband holds for his *own* life, as the right of dower is but a continuation of the husband's estate;[1] and although the same reason for excluding dower does not exist where an estate is held *pur autre vie*, yet the common law, for reasons which will be hereafter stated, makes no distinction, and rigorously applies the same rule in both classes of cases.[2]

2. "By common speech," says Littleton, "he which holdeth for term of his own life, is called tenant for term of his life, and he which holdeth for term of another's life, is called tenant for term of another man's life."[3] Upon which Lord Coke has these observations: "Now it is to be understood that if the lessee in that case dieth, living *cestui que vie*, (that is, he for whose life the lease was made,) he that first entreth shall hold the land during that other man's life, and he that so entreth is within Littleton's words, viz. *tenant pur autre vie*, and shall be punished for waste as tenant *pur autre vie*, and subject to the payment of the rent reserved, and is in law called an *occu-*

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[1] Park, Dow. 48, 49; 1 Greenl. Cruise, 181, § 17. And see Exton *v.* St. John, Finch, 368.

[2] Ibid.; Bracton, 92, b.; Plow. 556; Bowles *v.* Poore, 1 Bulstr. 135; Low *v.* Burron, 3 P. Wms. 262; see 1 Ves. Sr. 303.

[3] Litt. sec. 56.

pant, (*occupans*,) because his title is by his first occupation. In like manner it is of an estate created by law, for if a tenant by the curtesie or tenant in dower grant over his or her estate, and the grantee dieth, there shall be an *occupans*."[1] This rule, which was limited to corporeal hereditaments, was founded upon the idea that the estate, upon the death of the grantee, could not go to the heir, for the reason that there were no words of inheritance; nor to the executor, because it was a freehold estate. For these reasons it was supposed the estate became derelict, and that the person who first entered might lawfully retain possession, and would become vested with all the rights and subject to all the obligations and liabilities of the grantee.[2] Upon such an estate, so long as this doctrine was recognized, it is manifest no right of dower could attach.

3. The intrinsic injustice of such a doctrine is very palpable; and it is also apparent that it must have been the fruitful source of much mischievous controversy, and would necessarily call for modification at the hands of the legislative power. Accordingly, by the statute of 29 Car. II., chapter 3, sec. 12, it was enacted "that any estate *pur autre vie*, shall be devisable by will, &c., and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee simple. And in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands." A statute upon the same subject was also passed in the 14 of Geo. II. which, after reciting the 29 Car. II., and that doubts had arisen, where no devise had been made of such estates, to whom the surplus remaining after the payment of debts, belonged, enacted as follows: "That such estates *pur autre vie*, in case there be no special occupant thereof, of which no devise shall have been made according to the said act, or so much thereof as shall not have been so devised, shall go, be applied, and distributed in the same manner as the personal estate of the testator or intestate."[3] A more recent act provides that estates *pur autre vie*, if not devised, shall be chargeable in the hands

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[1] Co. Litt. 41, b.

[2] 1 Greenl. Cruise, 109, § 43; Lambert on Dower, 21, 49.

[3] 14 Geo. II. ch. 20, § 9.

of the heir, as assets by descent; and if there be no special occupant, they are to go as already provided.[1]

4. The right of *special* occupancy existed where an estate was limited to the grantee *and his heirs, pur autre vie;* in which case the heir or heirs of the grantee, upon his death, would have the exclusive right, by the terms of the original grant, to enter and occupy the lands during the residue of the term, and no right of general occupancy could arise.[2] But although this interest partook very much of the character of a descendible freehold estate, yet by the common law it furnished no foundation for the estate of dower.[3] Nor do the several acts of Parliament above referred to change this common law rule in any particular. The effect of these enactments is simply to abrogate the right of general occupancy; to confer upon the grantee of an estate *pur autre vie* the right to dispose of the unexpired portion of the term by will; and to direct, in substance, that such interest of the deceased grantee shall be held and treated as personal estate.[4]

5. An estate is sometimes created for the life of the tenant, and the life or lives of one or more third persons. It may also be made to depend upon a contingency, the happening of which will determine it before the death of the grantee. It is hardly necessary to add that in neither of these cases is the estate subject to dower.[5]

The rule in the United States.

6. The provisions of the English statutes relating to estates *pur autre vie* have been substantially adopted in New York,[6] New Jer-

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[1] 1 Victoria, ch. 26. See, also, as to the rights of residuary legatees, Ripley *v.* Waterworth, 7 Ves. Jr. 425; Milner *v.* Lord Harewood, 18 Ves. Jr. 259.

[2] Doe *v.* Robinson, 8 Barn. & Cress. 296; 1 Greenl. Cruise, 111, § 48.

[3] Plow. 556; 1 Bulstr. 135; Cro. Eliz. 805; Park on Dower, 48, 49. And see Bracton, 92, b.; Low *v.* Burron, 3 P. W. 262; 1 Ves. Sr. 303.

[4] Reference may also be had to the following additional authorities: Lord Windsor's case, 3 Leon. 35; Dyer, 328, b., pl. 10; Buller *v.* Cheverton, 2 Roll. Abr. 151; Salter *v.* Butler, Moo. 664; Cro. Eliz. 901; Yelv. 9; Westfaling *v.* Westfaling, 3 Atk. 460; Williams *v.* Jekyl, 2 Ves. Sr. 681; Atkinson *v.* Baker, 4 Term R. 229; Bac. Abr. tit. Est. for Life, 8; 4 Kent, 27; 1 Greenl. Cruise, 110–113, where the English cases are collected and considered.

[5] Brac. lib. 4, c. 28, sec. 1; Co. Litt. 42, a.; The People *v.* Gillis, 24 Wend. 201; 4 Kent, 26.

[6] 2 Rev. Stat. N. Y. (3d ed.) p. 9, § 6.

sey,[1] Virginia,[2] Maryland,[3] Kentucky,[4] Indiana,[5] Rhode Island,[6] Alabama,[7] Arkansas,[8] Wisconsin,[9] and Mississippi.[10] In Massachusetts,[11] Maine,[12] North Carolina,[13] and Vermont,[14] estates *pur autre vie* are made descendible like fee simple estates.

7. The rule of the common law upon the subject of dower in estates *pur autre vie* was recognized and applied in New York at an early day in the case of Gillis *v.* Brown.[15] In that case the life estate of a tenant by the curtesy initiate was sold on execution, and after the death of the purchaser, which happened during the lifetime of the tenant, his widow claimed dower in the estate. The claim was disallowed. "The husband of the demandant," the court said, "had not an estate that could descend to his heirs. It was *pur autre vie.* By the English statute, (29 Car. 2, ch. 3, sec. 12,) such an estate descends to the heir if it comes to him as a special occupant. It was enacted to prevent the mischief which previously existed, that where no special occupant was designated by the grant, it belonged to the person who first took possession. 4 *D. & E.* 229. This act enables the proprietor to devise the estate; but when no devise is made, it is chargeable in the hands of the heir, if it comes to him by reason of a special occupancy, as assets by descent, as in case of lands in fee simple; and if there be no special occupant, it shall go to the executor and be assets. Our act (1 *R. L.* 365, s. 4) declares that estates of this description shall be devisable; and if no devise be made they shall go to the executor or administrator, to be applied and distributed as part of the personal estate. The consequence is the demandant is not entitled to dower."

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[1] Rev. Code, 1820, p. 223; Elmer's Dig. p. 596, § 5; Act of April 15, 1846, Nixon's Dig. p. 873.

[2] Hen. Stat. at Large, vol. xii. p. 152, § 51; Code of Va. (1849,) p. 500, § 5.

[3] 1 Dorsey, p. 889; 1 Mafyl. Code, p. 666, § 220.

[4] Rev. Stat. Ky. (1852,) p. 190, § 13; 2 Stanton's Rev. p. 226, § 6.

[5] Rev. Stat. 1843, ch. 30, art. 1, § 6.

[6] Rev. Stat. 1844, p. 281; Rev. Stat. 1857, p. 537, § 1.

[7] Toulmin's Dig. p. 883, § 2.

[8] Ark. Rev. Stat. ch. 4, § 145; Dig. Ark. Stat. ch. 6, § 67.

[9] Rev. Stat. Wis. (1858,) p. 525, § 6.

[10] Rev. Code Missis. (1857,) p. 306, § 1.

[11] Mass. Rev. Stat. ch. 61, § 1; Gen. Stat. Mass. p. 476, § 1.

[12] Rev. Stat. (1857,) ch. 74, § 1.

[13] Rev. N. C. Code, (1849,) p. 250, Rule 12.

[14] Comp. Stat. Verm. (1850,) p. 364, § 1.

[15] Gillis *v.* Brown, 5 Cow. 388.

8. In Mississippi, also, it has been held that an estate *pur autre vie* is not subject to dower.[1] And in Missouri, under the act converting the estate of the first donee in tail into an estate for life, with remainder in fee to his heirs, it was adjudged that dower does not attach upon the estate of such donee.[2] But in New Jersey, in cases of this description, a contrary rule prevails, by express statute.[3] In Vermont, where the husband had conveyed certain lands, (his wife not joining,) reserving an estate therein during his own life and the life of his wife, it was held that she was dowable of the lands.[4] In North Carolina a testator died, leaving a will containing, among others, the following provision: "I will to my son B. all my estate, real and personal, for his use and benefit, and then to be divided off and distributed among his children, as he may think proper; that is to say, my land to be used by him, and the profits thereof to be to him, but the lands to be by him divided and distributed among his children, as he shall think proper." It was decided that under this will the son took but an estate for life in the land, with the power of dividing it, at, or prior to his decease, among his children, and that until such appointment the remainder in fee either vested in the children or descended to the heirs of the testator, and that the widow of the son had no dower in the land.[5]

9. In those States in which dower is allowed in estates for years, it would seem, upon principle, that estates *pur autre vie*, which are of a higher nature, should also be regarded as subject to the same right.

Estates for years.

10. The principles of the common law did not permit a right of dower to attach upon a mere chattel interest in lands, and so strict was the law in this respect that an estate for two thousand years, no matter in what form, or by what instrument created, would not confer dower upon the widow of the lessee, although such estate might be equally valuable, in point of occupation, with the inheritance itself.[6] In some of the States this rule has been modified, but in a

[1] Fisher *v.* Grimes, 1 S. & M. Ch. 107.

[2] Burris *v.* Page, 12 Misso. 358.

[3] Nixon's Dig. p. 196, § 11.

[4] Gorham *v.* Daniels, 23 Verm. 600. See note to this case, per Redfield, J., p. 612.

[5] Alexander *v.* Cunningham, 5 Ired. 430. See, also, Thompson *v.* Vance, 1 Met. (Ky.) 669.

[6] Park, Dow. 47, 48.

majority of them the doctrine of the common law is preserved in all its rigor.

11. Thus, in Maryland it was held that a leasehold estate for a term of years, even where the lease contained a covenant on the part of the lessor to convey the fee simple to the lessee upon request, did not confer dower.[1] And it was decided in the same case that a lease for ninety-nine years renewable forever, was a mere chattel interest, and not an estate in lands from which dower could be claimed. The same point was ruled the same way in Mississippi.[2] And in New York it was determined that the statute giving to a widow the right to tarry forty days in the chief house of her deceased husband, had no application to leasehold property, but related solely to lands in which she had a right of dower.[3]

12. The Dower Act of Massachusetts contains the following provision:—

When land is devised for the term of one hundred years or more, the term shall, so long as fifty years thereof remain unexpired, be regarded as an estate in fee simple as to everything concerning the descent and devise thereof upon the decease of the owner, the right of dower therein, the estate in lieu of dower, and the sale thereof by executors, administrators, or guardians, by license from any court; and also as to the levying of executions thereon, and the redemption thereof when taken on execution, or mortgage.[4]

The same act further provides that

When dower, or an estate in lieu of dower is assigned out of such land, the widow and her assignee shall be held to pay to the owner of the unexpired residue of the term, in case of dower, one third, and in case of an estate in lieu of dower, one half of the rent reserved in the lease under which the husband held the term.[5]

13. By the statute of Missouri

Dower in leasehold estates for a term of twenty years or more, shall be granted and assigned as in real estate; for a less term than twenty years, shall be granted and assigned as in personal property.[6]

This provision is copied into the Dower Law of Kansas.[7]

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[1] Spangler *v.* Stanler, 1 Md. Ch. Dec. 36.
[2] Ware *v.* Washington, 6 Smedes & Marsh. 787.
[3] Voelckner *v.* Hudson, 1 Sandf. S. C. Rep. 215.
[4] Gen. Stat. Mass. (1860,) p. 471, § 20; Rev. Stat. Mass. (1836,) p. 411, § 18.
[5] Gen. Stat. Mass. (1860,) p. 471, § 22.
[6] Rev. Stat. Misso. (1845,) p. 430, § 1.
[7] Comp. Laws Kansas, (1862,) p. 478, § 1.

14. In Ohio the law upon this subject seemed, at one time, in rather a peculiar and unsettled condition. A statute in force since 1805 not only gives to the widow dower in estates of inheritance, but also in "all the right or interest that her husband, at the time of his *decease*, had in any lands and tenements held by bond, article, *lease*, or other evidence of claim."[1] This statute clearly limits the right of dower in simple leasehold estates, to cases where the interest of the husband has not been disposed of in his lifetime,[2] and if there were no other legislation upon the subject, no difficulty could well arise as to the rights of the widow in this description of property. But owing to the course of legislation in Ohio, investing leasehold interests of a *permanent* nature with attributes entirely unknown to them at common law, and the judicial exposition which has, in some instances, been given these statutes, a question may possibly arise whether, where the husband has acquired a permanent leasehold estate, he is not to be regarded, in effect, as holding the land in fee simple, and the wife, as to that estate, entitled to her dower precisely as in an estate of inheritance.

15. As early as 1821 a statute was in force in Ohio which provided that all permanent leasehold estates should be considered and treated as real estate in proceedings on judgment and execution against the lessees, and that the officer acting in the premises should be governed by the statutes in force regulating sales of real estate on execution.[3] This statute, however, appears to have been regarded as directing the mode and manner in which permanent leasehold property should be subjected to levy and judicial sale, and as regulating judgment liens thereon, rather than as fixing and declaring the nature and character of the estate itself; for, in a case arising a few years after the passage of the act, it was held that a lease for ninety-nine years renewable forever, was personal estate, vesting, on the death of the lessee, in his personal representatives, and not sub-

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[1] 1 Chase, 472; re-enacted Jan. 1824, 29 Ohio Laws, 249, § 1; and in amendatory act of March, 1858, 55 Ohio Laws, 24; 1 Swan & Critchf. 516, § 1.

[2] Judge Walker appears to have doubted whether leasehold estates are subject to dower in Ohio. "The term 'lease,' used in the statute," he says, "probably has no meaning." Walker's Intr. (2d ed.) 314. But it is difficult to assign any sufficient reason for disregarding the language of the statute, which seems too explicit to admit of much question as to the intention of the legislature.

[3] 2 Chase, 1185.

ject to the control of his widow or heirs.[1] The doctrine of this case was shortly afterwards approved in Murdock *v.* Ratcliff,[2] and the court there made use of this emphatic language: "No proposition has been better settled from the earliest days of the common law, than that a lease, of whatever duration, is but a chattel."

16. In March, 1839, a new statute was passed, extending the provisions of the former law, and enacting "that permanent leasehold estates renewable forever, shall be subject to the same law of *descent and distribution* as estates in fee are, or may be subject to; and sales thereof upon execution, or by order or decree of the court, shall be governed by the same laws that now are, or may hereafter govern such sales of estates in fee."[3] This act repealed a prior statute substantially to the same effect, passed in March, 1837,[4] and is still in force. In the case of Loring *v.* Melendy,[5] which arose after the passage of the act of 1839, the judge who delivered the opinion of the court used this language: "Since the passage of this last act we may feel ourselves admonished by the uniform policy of the legislature, by calling things by their real names, to harmonize our whole system of legal jurisprudence. To withdraw permanent leasehold estates from their anomalous position between chattel and realty, and by calling them what in truth they are, *lands*, we relieve them from all doubt as to the principles and laws which shall control them, and assign to them a certain and fixed place in the law. A permanent leasehold estate is not a chattel, but is, in truth, *land carrying the fee.* Such is the nature of the estate, and so it has been treated and considered in the legislation of the State. We therefore declare that permanent leasehold estates are lands, *subject to all the rules and laws which attach to land for all purposes.*"

17. If the doctrine stated in these broad and comprehensive terms is to be applied in its full extent, the question may well arise, as already remarked, whether, as to leasehold estates of permanent duration, the right of dower is not governed by a different rule from

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[1] Reynolds *v.* Com. Stark Co., 5 Ohio R. 204. And see opinion of Birchard, J., in North. Bk. Ky. *v.* Roosa, 13 Ohio, 334, 363.

[2] Murdock *v.* Ratcliff, 7 Ohio, part 1, 119.

[3] 37 Ohio Laws, 44; Swan's Stat. (ed. 1841,) 289; 2 Swan & Critchf. 1142. This provision is also carried into the statute regulating descents and distributions. 1 Swan & Critchf. 505, § 20.

[4] 2 Swan & Critchf. 1142, note 2.

[5] Loring *v.* Melendy, 11 Ohio, 355.

that which properly applies to leasehold estates of an ordinary character; and whether, indeed, such interests are not to be regarded, to all intents and purposes, as estates of inheritance, and therefore as falling within the first clause of the dower act giving dower in all the lands of which the husband was seized during the coverture, and not within the other provision which manifestly has reference to mere equities and chattel interests of which the husband *died* possessed. For if "a permanent leasehold estate is not a chattel, but is in truth land carrying the *fee;*" and if, also, such estates "are lands, subject to *all* the rules and laws which attach to land for *all* purposes," as declared in unqualified terms in the case referred to, the result above indicated would seem legitimately to follow. The sweeping effect of this declaration of the law was recognized by the Circuit Court of the United States for the District of Ohio, in the case of McLean, Assignee, *v.* Rockey,[1] where, in a proceeding by the assignee of a bankrupt, under the bankrupt law of the United States, the object of which was to sell leasehold property held for a term of ninety-nine years renewable forever, the court held, on the authority of Loring *v.* Melendy, that in Ohio, such a leasehold is real estate, and therefore dismissed the bill.

18. With regard to the decision in the case of Loring *v.* Melendy, however, it is to be remarked that it gives to the act of 1839 a very liberal construction—more liberal, perhaps, than the fair import of the terms employed will fully warrant. The purpose and intent of the statute appears to be to bring permanent leasehold estates within the operation of the statutes regulating descents and distributions and the sale of real estate upon execution, and to go no further. And it may be further observed that the circumstances of the case did not necessarily require the court to declare as law the broad proposition enunciated by the judge who delivered the opinion, a fact which is conceded in the opinion itself. Nor is the doctrine there laid down founded upon the express letter of the act, but appears, rather, to rest upon the supposed policy which led to its enactment. "In thus emancipating permanent leasehold estates," the judge remarks, "from a name too narrow to convey their idea, and rules too contracted for their control, we are only carrying out the policy of our legislature upon this subject. And although this case might have been disposed of without deciding this point, yet as it fairly

[1] McLean, Assignee, *v.* Rockey, 1 West. Law Jour. 300.

comes up, and was the point upon which the case was reserved, we have thought proper to put this doubtful question at rest." That the question was *not* put at rest, however, is shown by the subsequent action of the court. In a short time afterwards grave doubts were thrown out as to the correctness of the *obiter* opinion above discussed. "The question whether a lease be realty or personalty," said the chief justice, "need not be here determined; but I take the opportunity to express my apprehension that the case reported last year (Loring *v.* Melendy and others, 11 Ohio Rep. 355) does not conclude this point, and I shall be ready to consider it when it becomes necessary."[1] On a subsequent occasion the court again referred to Loring *v.* Melendy, and observed that the opinion delivered in that case upon the question as to the nature of a permanent leasehold estate, was not considered by all the court at the time. "Hence," they added, "the remark made in the case of lessee of Boyd *v.* Talbert, 12 Ohio Rep. 213, 'the question whether a lease be realty or personalty,' is open."[2] And after considering the several statutes relating to the subject, and reviewing the authorities, they proceeded to dispose of the question as follows: "We hold, then, that for all purposes connected with the laws regulating judgments, executions, sales, and descents, permanent leasehold estates are to be regarded as if they were freeholds, and not chattels."[3] So long as there is no departure from this sensible construction of the acts of 1821 and 1839, the law with respect to dower in leasehold property is entirely free from difficulty. A permanent leasehold interest is to be proceeded against on judgment and execution as if it were a freehold estate. It is also to descend to the heir at law as realty, and not go to the administrator as personalty. But in all other respects, and for all other purposes, it retains the character impressed upon it by the common law. And if a husband die possessed of an interest in lands for a term of years, no matter what may be the extent of the term, his widow is entitled to be endowed of that interest in proportion to its duration and value. But if he dispose of it in his lifetime, then no right of dower attaches.

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[1] In Boyd *v.* Talbert, 12 Ohio, 212.

[2] North. Bk. of Ky. *v.* Roosa, 13 Ohio, 334.

[3] Approved in Buckingham *v.* Reeve, 19 Ohio, 399, 405. See, also, McAlpin *v.* Woodruff, 11 Ohio State, 120, 128.

Estates at will.

19. It is apparent, from what has been already said, that estates held at the *will* of the lessor are not subject to dower. By the rules of the common law, a copyholder is, strictly speaking, a tenant at will; and it is well settled that a copyhold estate does not confer a right of dower.[1] In England, by special custom in particular localities, a widow is entitled to what is called her *freebench* in copyhold estates; and this interest, which is limited to the estate of which her husband died seized, and which varies in extent in different portions of the country, resembles, in many respects, the estate of dower, and sometimes receives that appellation. It is, however, purely the creature of local custom, and such custom being contrary to the general rule of the common law, when alleged to exist as the foundation of a right of dower, or freebench, must be strictly proved.[2] But if a tenant at will make a feoffment, the feoffee is estopped from denying the seizin of the feoffor in an action brought by his widow to recover her dower.[3]

Wrongful estates.

20. It is sometimes said that a right of dower does not attach upon what is termed a *wrongful estate*, that is, the estate of a disseizor, abator, intruder, or the like. This proposition is true only, in a qualified sense; for until the wrongful estate has been avoided by the entry or action of the person entitled to the possession, or by operation of the law of remitter, the mere naked seizin of the husband, though wrongfully acquired, will support a right of dower as against all persons deriving title under such tortious seizin.[4] But after the wrongful estate has been determined in either of the modes above mentioned, the right to dower therein ceases also. Therefore,

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[1] 4 Co. 22, a., 22, b., and notes; Shaw *v.* Thompson, 4 Co. 30, b.; Vin. Abr. Copyhold, M. d. pl. 1; O. d. pl. 1; Dower, O. a. pl. 1; Com. Dig. Copyhold, K. 2; Bac. Ab. Copyhold, C. 2; Hob. 215, 216; Park, Dow. 48.

[2] Shaw *v.* Thompson, 4 Co. 30, b.; 4 Co. 22, a., 22, b., and note; Park, Dow. 48. See, also, 2 Bl. Com. 129, and notes.

[3] Taylor's case, cited 6 John. Rep. 293; Tud. Cas. 44; 1 Washb. Real Prop. 191.

[4] Bro. Dow. pl. 50; Fitz. Dow. 98; Perk. § 420; Park, Dow. 37, 141, 142; Bisset, Est. for Life, 92, 93; 1 Hilliard, Real Prop. 147, § 39. See, also, ante, ch. 12, §§ 31, 32, and ch. 14, § 2.

if the owner of an estate be disseized, and the disseizor marry, and afterwards the disseizee enter upon, or recover against the disseizor, the title of dower in the wife of the disseizor is defeated; and if the disseizor die seized, and his heir actually endow the widow, a recovery of the lands by the disseizee against the heir and the widow, will terminate the dower interest of the latter.[1] The difference with regard to the defeasible character of the estate of the heir and of that of the widow of the disseizor is thus stated by Littleton: "Also if a disseizor die seized, &c., and his heir enter, &c. who endoweth the wife of the disseizor of the third part of the land, &c. in this case, as to this part which is assigned to the wife in dower, presently after the wife entreth and hath the possession of the same third part, the disseizee may lawfully enter upon the possession of the wife into the same third part. And the reason is for that, when the wife hath her dower, *she shall be adjudged in immediately by her husband*, and not by the heir; and so as to the freehold of the same third part the *descent* is defeated. And so you may see that before the endowment the disseizee could not enter into any part, &c., and after the endowment he may enter upon the wife, &c., but yet he can not enter upon the other two parts which the heir of the disseizor hath by the descent."[2] As to the lands assigned the wife in dower, it is not necessary that the disseizee should resort to a real action, notwithstanding a descent cast, for the endowment defeats the descent *quoad* those lands, and the disseizee may therefore bring ejectment against the dowress.[3] But, "if after the dying seized of the disseizor, the disseizee *abate*, against whom the wife of the disseizor recover by confession in a writ of dower, in that case, though the descent be avoided as Littleton here saith, yet the disseizee shall not enter upon the tenant in dower, because the recovery was against himself, but if he had assigned dower to her *in pais*, some say he should enter upon her."[4]

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[1] Countess of Berkshire *v.* Vanlore, Winch, 77; Poor *v.* Horton, 15 Barb. 485; Park, Dow. 141, 142; Bisset, Est. for Life, 92, 93; 4 Kent, 48.

[2] Litt. sec. 393. And see Co. Litt. 240, b., 241, a.; Gilb. on Dower, 395. "The doctrine contained in this section seems to apply to the cases of a recovery suffered by the heir, either before or after the assignment of dower." Butler's note (2), Co. Litt. 241, a.

[3] Co. Litt. 240, b.; Park on Dower, 142, note (*e*).

[4] Co. Litt. 241, a.

21. A case showing the operation and effect of the law of remitter upon the right of dower in wrongful estates is given by Fitzherbert: "If a man have title *of action* to recover any land, and afterwards he entereth and *disseizeth* the tenant of the land, and dieth seized, and his heir entereth, *the heir is remitted unto the title which his ancestor had*, and the husband's wife shall lose the dower; for that estate which the husband had is determined, for that was an estate in fee *by wrong*, and the heir hath the estate in fee which his ancestor had *by right*."[1] This case presents a marked illustration of the subtlety and refinement pervading many of the rules of the ancient common law relating to Real Property. A technical seizin was necessary to give dower; but this requisite was satisfied by a possession acquired and maintained without lawful right. And if a man had title to lands, and a right of action to assert it, but no right of entry, and he nevertheless entered, he was treated as a disseizor; his possession was referred to the wrongful seizin, and not to his lawful title. The right of the widow to dower was, in like manner, limited to the wrongful estate, upon the principle before noticed that she was *in* immediately by her husband, and that her right was but a continuation of his estate. And yet the heir, upon entry made by him, by operation of the doctrine of *remitter*, was remitted to the rightful estate of his ancestor, which, as it overreached the wrongful seizin upon which the right of the widow rested, resulted in entirely defeating her estate. And thus by an arbitrary rule looking to the rigid enforcement of subtle distinctions rather than the administration of substantial justice, the claims of the heir were made to override those of the widow, even to the extent of depriving her of the provision humanely intended for her support.[2] The same principle is said to be applicable where a tenant in tail discontinues in fee, and afterwards marries, and during the coverture disseizes the discontinuee, and dies seized. In this case dower is denied to the widow upon the ground that the issue is remitted to the ancient entail, and the estate which the husband had during the coverture was wrongful. "The heir," says Fitzherbert, "is in of another estate of inheritance than the husband had during

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[1] Fitz. N. B. 149, (F.); Gilb. on Dow. 393. In the case supposed the disseizin of the rightful owner must have occurred before the marriage, as a disseizin during the coverture could not impair the right of dower.

[2] See 4 Kent, 48, 49.

the coverture."[1] "She shall not be endowed," observes Lord Coke, "for that the fee simple is vanished by the remitter, and her issue hath the lands by force of the entail."[2]

This arbitrary and merciless principle of the common law never formed a part of the American Law of Real Property.[3]

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[1] Fitzh. N. B. 149, (F.); Dyer, 41, a.; Park, Dow. 143, 144; 1 Greenl. Cruise, 181, § 18.

[2] Co. Litt. 31, b.

[3] See ch. 12, §§ 6, 7, 19. See, also, 1 Hilliard, Real Prop. (2d ed.) 183, § 33.

CHAPTER XVIII.

DOWER IN RENTS AND ANNUITIES.

§ 1–8. Dower in rents. | § 9–12. The doctrine as to annuities.

Dower in rents.

1. It is an established rule of the common law, that if a man make a lease of his lands for *life*, reserving rent to himself and his heirs, and afterwards marry and die, his widow shall neither be endowed of the reversion in the lands thus demised, nor of the rents reserved. She can not have dower of the reversion, "because there was no seizin in deed or in law of the freehold; nor of the rent, because the husband had but a particular estate therein, and no fee simple."[1] The rent in such case passes exclusively to the heir as an incident to the reversion.

2. But if the husband, before marriage, convey lands *in tail*, reserving rent to himself and his heirs, the widow will be entitled to dower in the *rent;* "because," says Coke, "it is a rent in fee, and by possibility may continue forever."[2] The mere statement of this proposition, however, implies that if the donee in tail die without issue, the wife of the donor will no longer be dowable of the rent reserved, for thereby the estate tail from which it is derived is determined, and as a necessary consequence the right to dower ceases also. Thus, it is said in Fitzherbert's Natura Brevium that "if a man make a gift in tail, reserving rent to him and his heirs, and afterwards the donor hath a wife, and the tenant in tail dieth without issue, the wife of the donor shall not be endowed of the rent because the rent is extinct, for it was reserved upon the estate tail, which is ended."[3] And where the wife has actually been endowed previously

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[1] Co. Litt. 82, a., 208, a., note 1; Park, Dow. 49; Perk. sec. 348, 467.

[2] Co. Litt. 82, a.

[3] Fitzh. N. B. 149, G.; Perk. sec. 317.

to the termination of the tenancy in tail, her dower shall, nevertheless, cease with the determination of the estate.[1] In illustration of this principle, Jenkins states the following case: "So of a grant of rent or land to one and his heirs till the building of St. Paul's shall be finished: if this contingency happens, dower shall cease as in the other case, where, after dower, the donee dies without issue, where the rent is reserved upon the said gift in tail."[2] Another case tending to elucidate this proposition is as follows: "If A. grants a rent out of certain lands to B. and his heirs, provided that if B. die, his heirs being within age, that during the non-age the terre-tenant shall be quit of the rent, and B. marries and dies, his heir within age, and the wife of B. recovers dower of the rent, execution shall be stayed till the heir comes to full age."[3] This case is referred to as showing that if the rent had been made to cease absolutely upon the event, the dower interest would also have been at an end.[4] To the foregoing may be added the following from Plowden, which, though not precisely in point, nevertheless very clearly illustrates the rule: "If a man makes a gift in tail rendering rent, and afterwards the *donor* takes a wife, she shall be endowed of the rent; but if the *donee* is a woman who dies, and her husband is tenant by the curtesy of the *land*, and afterwards the issue in tail die without issue, now the wife of the *donor* shall not have dower of the *rent;* for her title of dower was to be endowed of the rent of inheritance; and there can not be an inheritance in the rent longer than the inheritance in the land endures; and so the one is in respect of the other; and since her title was to be endowed of the rent of inheritance, and now the rent is changed into a rent for *life* only, and so is another degree before the execution of her estate, it shall never be executed, for it would be repugnant in itself."[5]

3. A clear distinction exists, in principle, between the case of a gift of *lands* in tail, reserving rent to the *donor* and his heirs, and the granting of a *rent* in tail, issuing out of lands, and care should be taken not to confound the two classes of cases. For, while in the former case dower may be claimed in the rent by the wife of the

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[1] Arg. Moore, 39, pl. 126; Park, Dow. 161–3. The rule is the same as to curtesy.

[2] Jenk. Cent. 4, Ca. 6.

[3] Fitzh. N. B. 149, G., note (*a.*); Corbet's case, 1 Co. 87, a.; Perk. sec. 327; Plow. 156; Jenk. Cent. 4, pl. 6.

[4] Park, Dow. 163, 164.

[5] Plow. 155. See, also, ante, ch. 13, § 12, and ch. 14, § 14.

donor during the continuance of the tenancy, yet, as we have just seen, her right falls with the determination of the tenancy, even after assignment. But where a *rent* is granted in tail, the wife of the *grantee* may have dower therein, although the tenancy be determined by the death of her husband without issue. This point is very clearly and succinctly stated by Jenkins: "A grantee of a rent in fee, or in tail, takes a wife, and dies without an heir; his wife shall be endowed."[1] And it makes no difference in this respect whether the rent be already *in esse*, or granted *de novo*. The rule is the same in either case.[2] This doctrine is founded upon the old common law principle that dower is a right or privilege annexed to the estate of the husband, and forming part thereof.[3] According to that principle the right of dower is embraced in the limitation of the original estate, and the rent, therefore, is as much *in esse* for the purposes of dower after the termination of the tenancy in tail, as it was for the purposes of that estate during its existence. Nor does it affect the question, as regards the right of the widow, that there is no person entitled in law to the remaining two-thirds of the rent.[4]

4. The foregoing discussion has rendered it, in a measure, unnecessary to add here, that where a grant is made in *fee* of rent issuing out of lands, the wife of the grantee may claim dower therein—a doctrine that is well settled. And, as in the case just considered with reference to a tenancy in tail of a rent, the death of the grantee without heirs, whereby his estate is determined, does not impair the right of the widow to her dower. She may still prosecute her claim to be endowed of the rent, and the law will enforce and protect such claim.[5]

5. It is laid down by Perkins that if a man seized of a rent charge

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[1] Jenk. p. 5, Ca. 6. See, also, Co. Litt. 30, a., Lord Hale's notes.

[2] Park, Dow. 161. But see opinion of Lord Chancellor Talbot, contra, as to rents *de novo* in an expired estate tail, Chaplin *v.* Chaplin, 3 P. Wms. 229, and Mr. Park's comments thereon, Park, Dow. 160–2.

[3] Paine's case, 8 Co. 207, 34, a.; 208, 34, b.; Earl of Bedford's case, 7 Co. 67, 68, 9, a. See, also, Co. Litt. 31, b., 241, a.; Perk. sec. 317; Fitzh. N. B. 149, G.; Bro. Dow. pl. 86; 4 Kent, 49. The principle here alluded to is more fully considered ante, ch. 13, §§ 12–14, and ch. 14, §§ 15–38.

[4] Park, Dow. 160–2.

[5] Co. Litt. 32, a.; Jenk. Cent. p. 5, Ca. 6. See Lord Hale's notes, Co. Litt. 30, a., with respect to curtesy; Park, Dow. 158–60; Chase's case, 1 Bland, 227; 1 Washb Real Prop. 167, § 24.

in fee, purchase the inheritance of the lands out of which the rent issues, his wife must elect of which she will be endowed.[1] And this appears to be law at the present day.[2] The author last referred to, however, extends this principle to the case of a feoffment in fee by the husband, reserving rent, and maintains that the widow must elect to be endowed either of the lands or of the rent; and that if she make choice of the former, she shall hold the part assigned her, discharged of the latter.[3] The authority cited and relied upon for this position is Perkins, section 324. It has been doubted whether this authority supports the doctrine thus laid down. The section in question reads as follows, the words in brackets, however, being inserted by Mr. Greening, the accomplished English editor of Perkins: "And some persons hold opinion that in a special case, a wife shall be endowed of land, and also of a rent issuing out of the same land: And therefore, they say, that if a man be seized of four acres of land in fee, and take a wife, and enfeoff a stranger thereof by deed indented, rendering unto him and his heirs three shillings rent, with a clause of distress, and die; and the feoffee endows the wife of the feoffor of the third part of the land, the land which is assigned to her in dower is discharged of the rent, and the whole rent is issuing out of the residue of the land: [And she shall be endowed of this rent, also:] And the reason is, because the wife shall be endowed of the best possession which her husband had during the coverture; and the husband was seized of this land during the coverture discharged of the rent; and so, &c. And this rent is a rent charge, and doth not come in lieu of the land; and the husband had an estate in fee in the rent during the coverture." Mr. Greening appends to this section the following observations: "The words between the brackets in this section are not in the text of any copy of the work which the editor has seen, but appear wanting to complete the sense of the section; and the position is taken to be law. With regard to the wife's right to dower in the land discharged of the rent, there can be no difference of opinion; and as the rent charge must be construed to be *granted* by the feoffee, it is a new purchase by the husband, (Co. Litt. 12, b.) of which he was seized in fee, and of which *prima facie* the wife is, therefore, dowable; and the consideration for the rent, or the land upon which it is charged, could not be regarded by the law; or if it were, would

[1] Perk. sec. 320. [2] 1 Roper, Husb. and Wife, 345.
[3] 1 Roper, Husb. and Wife, by Jacob, 347, 348.

not vary the construction. This case is clearly different from that cited 1 Inst. 150, a. and put by Hale in his note to Co. Litt. 12, b., where the wife was entitled to an estate for life in the whole rent by purchase. The case of dower on an exchange, it will be recollected, is an exception, not a rule. Mr. Roper (Husband and Wife, 1, 345) says, the wife shall elect between the land and the rent, and cites this section as his authority; it does not appear to support him. The point is noticed, and some references upon it given in Fitz. Abr. tit. *Dower*, pl. 63."[1]

6. An estate for years, whether created before or after marriage; and if after marriage whether the wife join therein or not, interposes no obstacle to a claim of dower.[2] In every such case the wife is entitled to be endowed of the reversion in fee, and also of a proportionate part of the rent as incident to the reversion.[3] "If the husband maketh a lease for years reserving a rent, and taketh wife, the husband dieth, the wife shall be endowed of the third part of the reversion by metes and bounds, together with the third part of the rent, and execution shall not cease during the years. And herewith agreeth the common experience at this day."[4] This rule was applied by the Supreme Court of the United States in a case where the wife joined in the execution of the lease, upon the principle, it would seem, that a release from the wife to the lessee amounts only to a confirmation of his title.[5] And a similar decision has been made in New York, the court holding that, as between the wife and the heirs of the husband, such a release by her is no relinquishment of her right of dower.[6]

7. But where no rent is reserved in a lease made by the husband before marriage, or by the husband and wife after marriage, in either case, the wife, although entitled to her dower in the lands demised, will nevertheless take it subject to the term, and with a *cessat executio* during the term, and she can neither enter nor receive any

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[1] See, also, Perk. sec. 826, and note to that section.

[2] See ante, ch. 11, §§ 5, 11, 12.

[3] Co. Litt. 29, b., 32, a., 208, a., note 1; Vin. Abr. tit. Dower, 233, pl. 7; Park, Dow. 77; 1 Greenl. Cruise, 178, § 9; Wheatly *v.* Best, Cro. Eliz. 564; Stoughton *v.* Leigh, 1 Taunt. 402; Herbert *v.* Wren, 7 Cranch, 370; Williams *v.* Cox, 3 Edw. Ch. 178; Weir *v.* Humphries, 4 Ired. Eq. 264; 4 Kent, 40; 1 Hilliard on Real Prop. (2d ed.) 134, § 46; Perk. by Greening, sec. 348, note.

[4] Co. Litt. 32, a., 32, b., 208, a., note 1.

[5] Herbert *v.* Wren, 7 Cranch, 370; 1 Hilliard on Real Prop. (2d ed.) 134, § 46.

[6] Williams *v.* Cox, 3 Edw. Ch. 178.

profit until it has terminated.[1] This, if the term be of long duration, virtually deprives her of her dower. In like manner, where there is a gift by will to one for a term, with remainder to another in fee, the wife of the latter, though she has a right of dower, takes it subject to the existing term. The same rule applies to all chattel interests in lands, as well as to terms, strictly speaking. Thus, where a testator devised a cotton factory and all its appurtenances to his three children, to be equally divided among them, as also the profits, when the youngest should arrive at twenty-one years of age, and in the mean time the factory was to be carried on under the sole management and direction of the executor until such period of division, and the profits were to be suffered to accumulate; and one of the children died before such period, leaving a widow, it was held that although this was such a chattel interest in the executor as did not prevent the assignment of dower to the son's widow, yet that it had the effect to postpone the enjoyment of the dower interest until the time appointed for the division.[2] And although where rent is reserved upon a lease for years, the wife is entitled to be endowed of the rent, and the judgment in such case is general, giving her dower in the rent and the reversion, yet the execution is special, and the sheriff is not authorized nor required to oust the tenant, but merely to enter and demand seizin for the widow.[3]

8. It has been already stated that at common law no right of dower attaches upon an estate *pur autre vie*, even where such estate is made descendible to the heirs of the grantee as special occupants.[4] This principle extends also to *rents* granted *pur autre vie;* as where a rent is granted to A. and his heirs during the life of B. The wife of A. has no right of dower in such rent.[5]

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[1] Co. Litt. 208, a., note 1; Williams *v.* Wray, 1 P. Wms. 137; Park, Dow. 77, 78; Weir *v.* Humphries, 4 Ired. Eq. 264, 274, 275; 1 Hilliard, Real Prop. (2d ed.) 134, § 46. This is the rule at *law*. In *equity*, however, relief is given the dowress as against the heir or devisee of the husband where the term is attendant upon the reversion, that is to say, where it is held in trust for those interested in the inheritance, or is satisfied; though in the English courts the rule is otherwise as to a purchaser. See Park, Dow. ch. 17, and post, ch. 23, § 3, note.

[2] Weir *v.* Humphries, 4 Ired. Eq. 264, 275.

[3] 1 Hilliard, Real Prop. 134, note.

[4] Ante, ch. 17, §§ 1, 2.

[5] Gawen *v.* Ramtes, Cro. Eliz. 804; Park, Dow. 48, 49.

Annuities.

9. Strictly speaking, an annuity is mere personal estate, and therefore not subject to dower.[1] The distinction between an annuity merely, and a rent issuing out of or chargeable upon lands, is very clearly marked in the books. The one charges the person only, and although granted in fee is nevertheless treated as personalty. The other is a burden imposed upon, and issuing out of lands.[2] "If I, by my deed, for me and my heirs," says Lord Coke, "grant an annuity to a man and the heirs of his body, for that this only chargeth my person, and concerneth no land, nor savoreth of the realty."[3] And in Doctor and Student, some of the points of difference between a rent and an annuity are thus stated: "Every rent, be it rent service, rent charge, or rent seck, is going out of land. Also of an annuity there lieth no action, but only a writ of annuity; but of a rent the same action may lie as doth of land. Also an annuity is never taken for assets, because it is no freehold in the land, nor shall it be put in execution upon a statute merchant, statute staple, or *elegit* as a rent may."[4] Fitzherbert refers to the old proceeding by writ of annuity in the following terms: "A writ of annuity lieth in case where a man granteth unto another a yearly rent for life, or for years, or in fee, out of his lands, or out of his coffers, or to receive from his person yearly at a certain day; now the grantee may sue a writ of annuity for the same, &c. if he be behind at the day of payment, &c. And if it be granted out of the land, with a clause of distress, then he may choose either to distrain for the same, and make it a rent charge, or he may bring a writ of annuity for the same. But if he bring a writ of annuity for it, if the defendant appear, and the plaintiff declare thereupon, then he can not distrain for it after. And in like manner if he do distrain for it and avow, then he shall not sue a writ of annuity for the same rent. But if a man grant a yearly rent for life, for years, or in fee, and doth not express in the grant that it shall be taken out of any lands or tenements, nor any distress granted for non-pay-

[1] Co. Litt. 32, a.; Perk. sec. 347; 1 Roper on Husb. and Wife, 344; (32 Law Lib.); Macqueen on Husb. and Wife, 170; Park on Dower, 111; (11 Law Lib.); 1 Washb. Real Prop. 167, § 24.

[2] Ibid.; 2 Bl. Com. 40.

[3] Co. Litt. 20, a.

[4] Doct. and Stud., dial. 1, ch. 30; see, also, ch. 8.

ment thereof, then it is merely taken for an annuity; and he shall not have any other remedy for the same but a writ of annuity."[1]

10. Where an annuity is granted, as in the case put by Fitzherbert, so as to bind both the person and the real estate of the grantor, there is no doubt that the grantee has his election, either to bring a writ of annuity, treating his demand as a personal one only, or to distrain upon the land as for a real interest. A grant of this character is, in substance, the creation of a rent charge, with a power of election in the grantee or his heirs—always incident to an estate thus created—to convert it into a simple annuity. Upon such election being made, and the proper steps taken to perfect it, the estate loses its character of a real hereditament, and from thenceforth becomes mere personalty.[2] And from this condition of the law it results that, although a widow is entitled to be endowed of a rent charge so long as it retains that character,[3] yet it is in the power of the husband to defeat her claim by electing to take the rent charge as a personal annuity, and bringing a writ of annuity, which is a mere personal remedy, to enforce it as such. So, also, if the husband die before distress and avowry made, or before electing to proceed by writ of annuity, the heir, by resorting to this proceeding, may, in like manner, deprive the widow of her dower. Nor is it necessary that he should recover judgment upon his writ; it is sufficient that he proceed no further than the filing of a declaration, for thereby his election is fixed, and the rent charge will be converted into a personal annuity, and the lands be forever discharged from the real remedy by distress.[4] But nothing short of such election in a court of record by suing out the writ of annuity, and a recovery therein, or declaring in the action, can, at common law, defeat the right of dower. If the husband die without having made an election, and afterwards the widow institute proceedings against the heir for dower, he can not defeat her action by claiming to hold the rent charge as an annuity, for he can not make his election by *claim* merely, but he must sue out his writ; and if, before declaration filed,

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[1] Fitzh. N. B. 152.

[2] Litt. sec. 219; Co. Litt. 144, b., 145, a.; Perk. sec. 373; 2 Bl. Com. 40, and note.

[3] Perk. sec. 347.

[4] Perk. sec. 373; Litt. sec. 219; Co. Litt. 82, a., 144, b., 145, a.; Sprint *v.* Hicks, 2 Bulst. 148; 2 Bl. Com. 40, note; Park, Dow. 111; 1 Roper, Husb. and Wife, 344, 345; 1 Greenl. Cruise, 188, § 35; 1 Hilliard on Real Prop. 251, § 76.

the widow can recover judgment against him, her right to dower will be established, and made absolute.[1]

11. In the case of Earl of Stafford *v.* Buckley,[2] it was held that a perpetual annuity granted by Charles II. out of the 4½ per cent. duties payable for exports and imports at Barbadoes, was a personal inheritance, and although descendible, had no relation to lands or tenements, and in no respect partook of the nature of a rent. And in the case of Lady Holdernesse *v.* The Marquis of Carmarthen,[3] before Lord Thurlow, an annuity charged upon the post-office until the sum of one hundred thousand pounds should be paid, in order to be laid out in land, was held to be a personal annuity, and that its character was not affected by reason of the purpose for which the fund was to be raised. According to the opinion of the lord chancellor, the peculiar character of the grant, and the circumstances attending it, prevented the court from treating the fund as money directed to be laid out in land.[4]

12. In Maryland it was held that a legacy in these words—"I give and bequeath to A. the sum of $6000, as an annuity, to be paid her out of the profits of my real estate annually"—constituted an annuity, and not a rent charge.[5] It is said, however, that in Virginia, dower is allowed upon annuities, as well as rents, charged upon, or issuing out of real estate.[6]

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[1] Co. Litt. 144, b., 145, a.; Fitzh. N. B. 152, a., and authorities cited in preceding note. As to the distinction taken by Lord Chancellor Talbot between a rent charge *de novo* and one already *in esse*, in which an estate of inheritance is created, see Chaplin *v.* Chaplin, 3 P. Wms. 229.

[2] Earl of Stafford *v.* Buckley, 2 Vesey, Sr. 170. See a MS. note of this case cited by Mr. Hargrave, Co. Litt. 20, a., note 4.

[3] Holdernesse *v.* Carmarthen, 1 Bro. C. C. 377.

[4] See, also, Turner *v.* Turner, Ambl. 782; Priddy *v.* Rose, 3 Meriv. 86, 93; Buckeridge *v.* Ingram, 2 Ves. Jr. 662, 665; Aubin *v.* Daly, 4 Barn. & Ald. 59, 6 Eng. C. L. 349.

[5] Robinson *v.* Townshend, 3 Gill & John. 413; see, also, Chase's case, 1 Bland, 227.

[6] 1 Hilliard, Real Prop. (2d ed.) 145, § 26.

CHAPTER XIX.

DOWER IN TRUST ESTATES.

§ 1, 2. At common law estate of *cestui que use* not subject to dower.
3. The Statute of Uses.
4–17. Dower in estate of *cestui que trust.*
18. Statute 3 & 4 Will. IV. chap. 105.
§ 19–25. Rule in the United States.
26. Reversionary estate of *cestui que trust.*
27, 28. Disseizin of *cestui que trust.*
29–35. Estate of trustee.

At common law estate of cestui que use not subject to dower.

1. THE system of *Uses*, as it originally existed in England, was borrowed from the civil law, which recognized a distinction between a right to the enjoyment of the rents and profits of land, and a right of property in the land itself; and it owes its introduction into that country to the ingenious efforts of the religious corporations of the realm to avoid the operation of the various disabling acts known as the Statutes of Mortmain, by which the English Parliament sought to restrict those bodies in the acquisition of real property. These disabling acts, by their terms, related solely to *legal* estates, equitable estates in land at that time being comparatively unknown. In order to evade these enactments, and avoid the forfeitures imposed thereby, the clergy resorted to the expedient of procuring conveyances of land intended for the church, to be made to individuals, with the understanding, however, that the church should be entitled to the beneficial enjoyment of the land thus conveyed. By this mode of conveyance the legal title became separated from the beneficial ownership; but as the common law took no notice of this beneficial interest, the church would have been powerless to compel a performance of the understanding upon which the estate was conveyed, and in many instances would have been deprived of the fruits of her ingenious device, had it not been for the interposition of the Courts of Chancery in her behalf. At that period, these courts were almost exclusively under the control of ecclesiastics, and they speedily

assumed jurisdiction of this class of conveyances, upon the ground that they affected the *conscience* of the grantee of the legal title, and therefore were the legitimate subject of equitable cognizance. The Courts of Chancery, having thus acquired jurisdiction of conveyances to uses, protected the interest of the beneficiary, or *cestui que use*, and by their decrees secured to that interest substantially all the benefits attaching to the possession of the legal estate. Indeed, estates held in this manner gradually came to be regarded as possessing many advantages over estates transferred in the usual form. It was determined that lands held by way of use were exonerated from the burdens pertaining to the feudal tenure; that they were not liable to forfeiture for treason, and were discharged from other burdens incident to the ordinary legal estate. The practice of conveying lands in this manner being thus fostered and encouraged, speedily grew into a regular system, and became a common mode of assurance. By the end of the fifteenth century, a large proportion of the real property of England was held under conveyances to uses.[1]

2. One of the advantages secured by this mode of conveyance, was the avoidance of the right of dower. The estate of dower being regarded at common law as a strictly legal right, and as attaching only upon a *legal* seizin, it followed that the courts of law would not entertain a claim thereto in the estate of the *cestui que use*. But no such reasoning was applicable in the courts of equity. These courts had made the estate of the *cestui que use* subject, in many respects, to the incidents of legal estates, and a consistent adherence to principle would seem to have required them to embrace within the operation of the rule thus applied, the incidents of curtesy and dower. But they refused so to do, and it became the established doctrine, as well in courts of equity as in courts of law, that the estate of the *cestui que use* was not subject to either curtesy or dower.[2] No very satisfactory reason has been assigned for the adoption of this rule by the courts of equity. Chief Baron Gilbert supposes they would not allow the trustee to be seized to the use of

[1] 2 Bl. Com. 268, 327–332; Walker's Amer. Law, 299, 300; Williams, Real Prop. 129–31; 1 Sand. Uses, 15; 2 Fonblanque's Eq. § 3; 2 Washb. Real Prop. 91 *et seq.*

[2] Perk. sec. 349, 457, and notes by Greening; Gilb. Uses, 48, 49, and n. 4, 5; 1 Sand. Uses, 65; Shep. Touch. 504: Bac. Ab. Curtesy, B., Uses, B., 6; 1 Co. 123, a.; 4 Co. 1, b.; Dy. 11, pl. 47; Banks *v.* Sutton, 2 P. Wms. 700, 714; Chaplin *v.* Chaplin, 3 P. Wms. 229, 233, 234.

any person not expressly named in the trust, and for that reason excluded curtesy and dower from this description of estate.[1] Mr. Park suggests that possibly courts of equity, considering such interests only as arose by *contract*, the proper subjects of their jurisdiction, looked upon dower as a right arising solely by implication of law, and therefore not within the pale of equitable cognizance.[2]

Effect of the Statute of Uses upon the right of dower.

3. The Statute of Uses, enacted in the 27th of Henry VIII. (1535,)[3] was intended to correct the evils that had grown out of the system of conveying real property to uses, which had become so extensive as to call loudly for legislative interference and reform. The intention of this statute was to destroy the double property in land resulting from the introduction of uses; not by destroying the *use*, but by changing it from an equitable to a legal estate. Accordingly it was enacted, in substance, that whenever one person was seized of land for the use of another, he who had the use should, *ipso facto*, have a *legal* estate of the same measure and quality. Wherever this statute could operate, therefore, its effect was to abolish the intervening legal estate, by annexing it to the use, and making that a legal estate.[4] By its operation the bargainee, or *cestui que use*, became vested with both the legal and equitable estate immediately upon the delivery of the conveyance. The result, therefore, was to confer upon the wife of the *cestui que use* the right of dower in the estate conveyed, as in any other lands of which the husband had the legal seizin.[5] It was not long, however, until the spirit of this statute was evaded, and its provisions practically nullified, by the invention of a system of *trust estates*. A conveyance *in trust* differed slightly in form from a conveyance to uses as made prior to the statute, but in substance was identical with it. But conveyances in trust were, nevertheless, sustained by the Courts of Chancery, as not being within the operation of the statute.

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[1] Gilb. Uses, 25. [2] Park, Dow. 125. [3] 27 H. VIII. ch. 10.

[4] Walker's Amer. Law, 2d ed., 300; Williams, Real Prop. 131, 132.

[5] Gilb. Uses, 96; Park, Dow. 84; 1 Greenl. Cruise, 171, § 21; 2 And. 161; ante, ch. 12, § 27.

Dower in estate of cestui que trust.

4. The Statute of Uses, as we have just seen, had the effect by its own inherent force, of *executing the use*, or in other words, of converting it into a legal estate. Thus, if a conveyance were made to A. for the use of B., the statute immediately transferred the legal estate to B. But here its operative power was expended. Consequently, if a conveyance were made to A. for the use of B. *in trust* for C., the statute would execute the use in B. by investing *him* with the legal estate, but it would not transfer the estate to C. In such case, therefore, B. would take the legal estate in trust for C., and this trust the Courts of Chancery stood ready to uphold precisely as they had already sustained and enforced conveyances to uses. And by refinement so subtle, and a contrivance so simple, was the celebrated Statute of Uses practically abrogated; so far, at least, as it was intended thereby to unite, in all cases, the legal with the equitable estate.[1]

5. One of the recitals contained in the Statute of Uses is to the effect, "that by uses men lost their tenancies by the curtesy, and women their dowers,"[2] and this was one of the mischiefs sought to be remedied by that act.[3] Indeed, it had become a common practice to convey lands by way of use, for the express purpose of defeating dower.[4] After the passage of the statute of uses, and the invention of conveyances in trust, the courts of equity so far respected the manifest intent of the legislature as to annex to trust estates the incident of curtesy;[5] and some of the most learned of the equity judges labored zealously to effect the same result with respect to dower. In this, however, they ultimately failed. But for a long time the question of the right of dower in the estate of the *cestui que trust* was in an unsettled condition, and the rule excluding dower

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[1] Williams, Real Prop. 134–86; Walker's Amer. Law, 300.

[2] 27 H. 8, ch. 10; Banks *v.* Sutton, 2 P. Wms. 700, 714; Chudleigh's case, 1 Co. 123, b.

[3] Chudleigh's case, 1 Co. 123, b., 124, a.

[4] Chaplin *v.* Chaplin, 3 P. Wms. 229; D'Arcy *v.* Blake, 2 Sch. & Lef. 387; 1 Washb. Real Prop. 161, § 13.

[5] Watts *v.* Ball, 1 P. Wms. 108; 2 Eq. Ab. 727; Sweetapple *v.* Bindon, 2 Vern. (pt. 2,) 536; Casborne *v.* Scarfe, 1 Atk. 603; 2 Eq. Cas. Ab. 728; Cunningham *v.* Moody, 1 Ves. Sr. 174; Roberts *v.* Dixwell, 1 Atk. 607; Hearle *v.* Greenbank, 1 Ves. Sr. 299; 3 Atk. 716; Chaplin *v.* Chaplin, 3 P. Wms. 229; Pitt *v.* Jackson, 2 Bro. C. C. 51; Steadman *v.* Palling, 3 Atk. 423; Sugd. Gilb. Uses, 48, note.

therefrom was not established without great difference of opinion and contrariety of decision.[1]

6. The first case in which the question was made appears to have been Colt *v.* Colt, decided in the 15 of Charles II.[2] In that case the widow claimed dower of a trust estate which the husband had himself created. The claim was disallowed. After this came Fletcher *v.* Robinson, determined in 1653.[3] According to the statement of that case, one Henry Robinson, for a valuable consideration, agreed to assure certain lands to Henry, his elder son, in fee; but falling into trouble for counterfeiting a patent under the Great Seal, conveyed the estate to John, his younger son, in fee, to prevent a forfeiture, and the younger son executed a declaration in trust to the father, who, being afterwards freed from his troubles, conveyed the estate to the elder son, and died. Subsequently the elder son died, leaving a widow, (the plaintiff,) but no issue; whereby the younger brother became his heir. The widow brought her writ of dower at law against the surviving brother, and instituted proceedings in the Court of Chancery to set aside the conveyance made to him, as an impediment to the recovery of her dower in the courts of law. The court thought the case a fit one to be maturely considered, and ordered it to be stated by one counsel on each side. The case, stated in conformity to this order, concludes as follows: "So that, upon the whole matter, the case, upon the bill, answer and proofs will fall out to be, that Henry, the father, being *cestui que trust* in fee, conveyed to Henry, the son, (*i.e.* the eldest son,) and his heirs, and Henry, the son died. Now whether the wife of the son, (the interest in law being still in the trustee; that is, the younger son,) shall be holpen to dower in equity, is the single question. Whereupon," the report continues, "the court is of opinion that there is good ground to set aside the said deed made to John, the youngest son, and that the plaintiff should have her dower out of the said manor of Binton, and other, the lands conveyed to the plaintiff's husband and his heirs, for the time to come, and to the arrears thereof from the death of her husband."[4] A decree was entered accordingly, directing the deed to the younger son to be set aside, as against the plaintiff; that it should not be given in evidence on the trial at law; and that as to

[1] Park, Dow. 124; Greening's note, Perk. sec. 349.

[2] Colt *v.* Colt, 1 Ch. R. 254; cited in Banks *v.* Sutton, 2 P. Wms. 708.

[3] Fletcher *v.* Robinson, Prec. Ch. 250; cited in Banks *v.* Sutton, 2 P. Wms. 710.

[4] Banks *v.* Sutton, 2 P. Wms. 710, 711.

the arrears of dower, the plaintiff should resort to the Court of Chancery for further directions, after the trial was had. In conformity to this direction a trial was had in the law courts, but upon that trial, the deed, notwithstanding the foregoing decree, was given in evidence, and the plaintiff was consequently nonsuited. Upon her application, and these facts being shown, the Court of Chancery ordered a commission to set out her dower, stayed proceedings on the nonsuit, gave her her costs in both courts, and ordered the defendant and his attorney, who insisted on giving the deed in evidence on the trial, to stand committed.[1]

7. This case was, for a time, justly regarded as an authoritative decision in favor of the right of dower in trust estates of inheritance.[2] The commissioners for the custody of the Great Seal at the time the decision was made, were Widdrington, Whitlock, and Lisle;[3] and in the subsequent case of Dudley *v.* Dudley, the Master of the Rolls, Sir John Trevor, thus alluded to the previous case, and to the learning and integrity of the commissioners before whom it was heard: "Though this was much contested, yet equity prevailed; and though the time in which it was adjudged may be objected, yet were they (the commissioners) learned men, who deliberated well, and pronounced their decrees according to their oaths, and according to justice and equity."[4] The ruling in Fletcher *v.* Robinson, however, met with much opposition; and in Radnor *v.* Rotheram,[5] it was declared by Lord Chancellor Somers to be agreed on all sides that a woman was not dowable of the trust of an inheritance. But the point had not yet been definitely settled; for a few years afterwards, in Otway *v.* Hudson,[6] it was maintained by Lord Cowper that the widow of a *cestui que trust* of a copyhold estate was entitled to her widow's estate (*i.e.* customary dower) in the same manner as if the husband had been clothed with the legal title. Nevertheless, in Bottomley *v.* Fairfax, it is said to have been "clearly agreed, that if a husband, before marriage, conveys his estate to trustees and their heirs in such manner as to put the legal estate out of him, though the trust be limited to him and his heirs, yet of this trust estate, the

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[1] Banks *v.* Sutton, 2 P. Wms. 711.

[2] Per Sir Joseph Jekyll, in Banks *v.* Sutton, 2 P. Wms. 712.

[3] Vide Whitlock's Memoirs, sub anno 1654; 2 P. Wms. 712, note.

[4] Prec. in Ch. 250; 2 P. Wms. 712.

[5] Radnor *v.* Rotheram, Prec. Ch. 65; decided in 1696.

[6] Otway *v.* Hudson, 2 Vern. (pt. 2,) 588; 27 Feb. 1706.

wife, after his death, shall not be endowed, and that this court hath never yet gone so far as to allow her dower in such a case."[1] So in Ambrose *v.* Ambrose, it was assumed as a settled point that a woman was not dowable of an estate bought by her husband in the name of a third person, and this decree was afterwards affirmed in the House of Lords.[2]

8. Thus stood the law when the celebrated case of Banks *v.* Sutton, determined in 1732, by Sir Joseph Jekyll, Master of the Rolls, came up for consideration.[3] The case was a proceeding for dower in behalf of the widow of a tenant in tail of a trust, to whom the legal estate was, by the will of the donor, directed to be conveyed, upon his attaining the age of twenty-one years, and who had lived to that age, and died without receiving a conveyance. The authorities were carefully reviewed, and the whole subject was very fully and thoroughly discussed. The opinion of the master of the rolls is an exceedingly able argument in behalf of the claims of the widow, and will well repay an attentive perusal. In the outset of his remarks he labored to show that dower is not only a *legal* right, created by express law, and a *moral* right, founded on the obligation of the husband to provide for the wife during her lifetime,[4] but also that it is an *equitable* right arising from contract, and founded on a valuable consideration: "By the common law," he says, "where a husband had an inheritable estate, it was part of the marriage contract that the wife should have her dower, one species of which was *ad ostium ecclesiæ*. Litt. sec. 39. 'When the husband comes to the church door to be married, after affiance or troth plighted between the husband and wife, he endows her;'[5] which implies that such endowment is before the marriage completely solemnized; and though my Lord Coke says such dower is *after* the marriage solemnized, this is a mistake.[6] Also, by the Romish ritual used here before the Reformation, it appears that all marriages were celebrated *ad ostium ecclesiæ;* so that it should seem to be incumbent on the husband, if he could do

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[1] Bottomley *v.* Fairfax, in 1712, Prec. Ch. 336; 1 Ch. Rep. 254; cited in Banks *v.* Sutton, 2 P. Wms. 708, 709.

[2] Ambrose *v.* Ambrose, in 1716, 1 P. Wms. 321.

[3] Banks *v.* Sutton, 2 P. Wms. 700; 2 Eq. Cas. Ab. 382, note.

[4] See ante, ch. 1, § 82.

[5] See ante, ch. 1, §§ 14, 20.

[6] In this the master is himself mistaken. See Perk. sec. 437; Hughes on Orig. Writs, 176; 2 Bl. Com. 134, note; Park, Dow. 138, note.

it, to endow his wife, and to specify the dower upon the marriage, instead of which the general words of endowing with *all his worldly goods*, in the office of matrimony now in use, have come in; from whence it is to be inferred, that dower is, and time out of mind has been, a part of the marriage contract, when it came to be publicly solemnized; and if so, a right of dower is founded in contract, and is, therefore, an equitable right."[1] He also proceeds to show that the right to tenancy by the curtesy in trust estates had become well established: "And as dower is more favored in law, reason and equity, than curtesy," he adds, "therefore every precedent for tenancy by the curtesy of a trust, is an authority for dower of a trust." And referring to the opinion of Lord Cowper in Watts *v.* Ball,[2] he makes these further observations: "His lordship laid down the rule generally, that trusts are to be governed by the same law, and are within the same reason as legal estates; and if there were not the same rule of property in all courts, things would be at sea, and there would be the utmost uncertainty; which general position, extending to the case of dower, as well as tenant by the curtesy, may be reckoned an authority for the one as well as the other. That trusts and legal estates are to be governed by the same rules, is a maxim which has obtained universally."[3]

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[1] Banks *v.* Sutton, 2 P. Wms. 705, 706. Mr. Park criticises these observations with much severity, as loose and unsound, and but little to the purpose. "That the wife has a *moral* right to a provision," he remarks, "is a consideration of legislative, and not of judicial application; courts of equity do not sit to enforce naked moral obligations; neither does the moral obligation of a husband to provide for his wife dictate any such specific and defined provision as that entitled dower." Park, Dow. 131. "It is difficult," he adds, "to conceive any reasoning more loose than the above, but even had it been otherwise, its application to equitable estates would have been sufficiently rebutted by Lord Talbot's observation before stated. Of the passage in the marriage service of the Church of England, alluded to by the learned judge, it is perhaps difficult now to point out the real history. That service was not composed by lawyers; and the divines who inserted it probably intended nothing more than to express the moral duty of the husband to make his wife the partaker of his worldly fortune. If the lawyers had been consulted on the subject, and it had been proposed by them to engraft a species of dower *ad ostium ecclesiæ* upon the formulary of the Protestant Church, they would surely have suggested some other mode of expressing it than that of 'with all my worldly *goods* I thee endow;' and if the effect of that expression be such as Sir Joseph Jekyll has represented it, it is difficult to say how a man can answer to his conscience in making that declaration in the face of the Church, who has the day before executed a settlement for barring his wife's dower." Ibid. 134, 135.

[2] Watts *v.* Ball, cited 2 Vern. (pt. 2,) 681; 1 P. Wms. 108.

[3] Banks *v.* Sutton, 2 P. Wms. 712, 713.

9. But while insisting with much force of argument that trust estates were subject to dower, the master of the rolls, nevertheless, eventually narrowed his proposition to a very small limit. He took a distinction between a trust created by the husband himself, and a trust created by a third person, and conceded, upon authority, that estates of the first class were not subject to dower. "The first case of this kind," he remarked, "is Colt *v.* Colt, 1 Chan. Rep. 254,[1] but the year and folio of the Register book there set down are false printed; it is the 15 Car. 2, fo. 794, and was a claim of dower of a trust created by the husband himself, as is the case of Bottomley and Fairfax, Preced. in Chan. 336,[2] and that of Ambrose *v.* Ambrose, (1 P. Wms. 321,)[3] heard in this court in 1716, and affirmed in the House of Lords in June, 1717. Where, therefore, the trust of an inheritance is created by the husband himself, I take it to be settled that the wife shall *not* have dower, even against the heir, nor against a devisee, the cases in reason being the same."[4] He contended, however, argumentatively, that where the trust was not created by the husband, the wife was dowable. "But whether the wife shall have dower of a trust of an inheritance created by *another person*, as against the heir or devisee, is a very different question. That the wife shall not have dower of a trust created by the husband, or (which is all one) of a purchase made by him in a trustee's name, may be reasonable, since it may be presumed to be done with intent to bar dower, and every man may do as he pleases with his own. Accordingly it has been commonly practiced for a purchaser to take a conveyance in his own name, and in the name of another person as trustee, purposely to prevent dower. It is said in Shower's Parliament Cases, 71, that Sergeant Maynard made a long lease to a servant on purpose to prevent dower, and the case of Bottomley and Fairfax in the book before mentioned seems to go upon the act and intention of the husband. . . . But where there is no conveyance to trustees by the husband in order to put the legal estate out of him, and the equitable interest (which in this court is taken for the whole) descends, or comes to the husband from another, who can not be presumed to have lodged the legal estate in trustees to prevent dower out of the estate of a future *cestui que trust*, (perhaps one not then born,) this seems to differ in reason, and does so by the authorities. I find

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[1] Ante, § 6. [2] Ante, § 7. [3] Ante, § 7.
[4] Banks *v.* Sutton, 2 P. Wms. 708.

no resolution against dower in such case, but on the contrary some allowing that as well as tenancy by the curtesy."[1]

10. Notwithstanding this course of reasoning, Sir Joseph Jekyll expressed himself unwilling, by judicial decision, to carry it to its legitimate result. After reviewing the authorities, he concludes his opinion upon this point as follows: "But after all these reasons and authorities, I must declare that I would not take upon myself to determine whether a wife should have dower out of a trust of inheritance where it is created, not by the husband, but some other person, *and no time limited for conveying the legal estate;* when that comes to be the case it will be time enough to do it; but the present very much differs from the common case of trust estates *in that there is a time limited for conveying the legal estate, and that time come in the life of the plaintiff's husband;* this makes it clear for dower, upon a principle well known and established in this court, that where an act is to be done by a trustee, that is to be looked upon as done which ought to be done; consequently the estate directed to be conveyed to the plaintiff's husband ought to be considered as actually conveyed to and vested in him, and then the plaintiff hath a right of dower out of it."[2]

11. Upon careful consideration of the opinion of the master of the rolls in the foregoing case, it will be observed that he holds: *First.* Upon the authority of decided cases, that there can be no dower of a trust estate where the trust is created by the act of the husband. *Second.* That where the trust is created by a third person, and a time is limited for conveying the legal estate, and that time has expired *in the lifetime of the husband*, the widow is entitled to dower as against the *heir or devisee* of the husband. He does not decide that she can have dower, even in such case, as against a purchaser from the husband. *Third.* He leaves the point undecided whether dower can be had of a trust estate created by a third person, where no time is limited for conveying to the husband the legal estate.

12. The case of Chaplin *v.* Chaplin,[3] decided by Lord Chancellor Talbot in the following year, is directly against the right of dower in trust estates. The principal question in the case was whether the plaintiff was dowable of an equitable rent charge, in the creation of which the husband had taken no part. On the hearing, the lord

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[1] Banks *v.* Sutton, 2 P. Wms. 709. [2] Ibid. 715.

[3] Chaplin *v.* Chaplin, 3 P. Wms. 229, decided in 1738.

chancellor was pressed with the argument that a right to tenancy by the curtesy existed in such cases, as was well established by the authorities cited, and that "it would not be pretended there were less strong reasons to be urged in favor of a dowress." But he refused to be influenced by these considerations, and in the course of his opinion disclosed, for the first time, the true ground of the disinclination of courts of equity to place dower and curtesy upon the same footing with reference to trust estates. Referring to the case of Sweetapple *v.* Bindon,[1] he remarked "that it might be right to allow an husband to be tenant by the curtesy of money to be laid out in land, since money agreed to be laid out in land is as land in equity, where everything directed by a will, or agreed by articles to be done, is looked upon as done."[2] In respect of Otway *v.* Hudson,[3] he said the decree in that case was not made upon a general rule that every widow of a *cestui que trust* had a right to dower, but upon the great and obstinate delay of the trustee, who refused to convey, and stood out a bill in the Court of Chancery requiring him so to do. He also noticed and commented upon Fletcher *v.* Robinson,[4] as a strange case and a most extraordinary trust: "For," he observed, "if the father, the *cestui que trust*, should have come for a performance of that trust, he could never have recovered; but the son should have held the land discharged, it being a fraudulent trust, made to protect the estate against a forfeiture. This probably was a short note of the case for the private use of some gentleman, and can be of service to no other." Upon the direct question of the right of dower in the trust estate, the report of the opinion of the lord chancellor is as follows: "His lordship took notice that by the preamble of the Statute of Uses,[5] it is recited that by means of these uses the wife was defeated of her dower; by which it appears that

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[1] Sweetapple *v.* Bindon, 2 Vern. (pt. 2,) 536.

[2] In a note to Chaplin *v.* Chaplin it is pertinently suggested that these observations will serve to warrant the resolution of the master of the rolls in Banks *v.* Sutton; for, however that learned argument may be considered as tending to prove in general that a woman ought to be endowed of a trust, yet in that particular case the legal estate was, by the will of the donor, directed to be conveyed to the *cestui que trust* on his reaching the age of twenty-one. As he actually lived to that age, his widow, on the principle above mentioned, was well entitled to dower. 3 P. Wms. 232, note B. Some of the American courts, in allowing dower in this class of cases, have acted upon this doctrine. Post, § 22.

[3] Otway *v.* Hudson, 2 Vern. (pt. 2,) 583; ante, § 7.

[4] Fletcher *v.* Robinson, Prec. Ch. 250; ante, § 6.

[5] 27 H. VIII., ch. 10.

the wife of *cestui que use* was not dowable at common law, and if so, then, as at common law an use was the same as a trust is now, it follows that the wife can no more be endowed of a trust now, than at common law, and before the statute, she could be endowed of an use. So that here was the opinion of the whole Parliament in the point; that it had been the common practice of conveyancers, agreeably hereto, to place the legal estate in trustees on purpose to prevent dower; wherefore it would be of the most dangerous consequence to titles, and throw things into confusion, contrary to former opinions, and the advice of so many eminent and learned men, to let in the claim of dower upon trust estates; that he took it to be settled, that the husband should be tenant by the curtesy of a trust, though the wife could not have dower thereof; for which diversity, as he could see no reason, so, neither, should he have made it; but since it had prevailed he would not alter it; that there did not appear to be so much as one single case, where, abstracting from all other circumstances, it had been determined there should be dower of a trust."[1] The bill, so far as it claimed dower of the trust estate, was dismissed. Afterwards the same point coming in question before the lord chancellor, in Shepherd *v.* Shepherd, the counsel for the widow, regarding it as having been clearly settled in the foregoing case, declined to argue it.[2]

13. Chaplin *v.* Chaplin was followed by Attorney-General *v.* Scott, which was also determined by Lord Talbot.[3] In that case dower was claimed of an equitable estate conferred upon the husband by devise. The lord chancellor adhered to his decision in Chaplin *v.* Chaplin upon substantially the same reasons therein expressed. "The case of Banks *v.* Sutton,"[4] he said, after discussing the general question, "seems to have been determined on this, that the time of the conveyance was come, and the husband had a right to call for it; and then the court, upon considering that as done which ought to have been done, might properly assist the wife in that case." In noticing the reasoning of Sir Joseph Jekyll with reference to the supposed equitable right to dower founded on the marriage contract, the chancellor remarked: "As to what is said that this is to be con-

[1] Chaplin *v.* Chaplin, 3 P. Wms. 234.

[2] 3 P. Wms. 234, note D. In March, 1735–6.

[3] In 1735. Atty.-Gen. *v.* Scott, Cas. t. Talbot, (Forrest.) 138; 3 Sugd. Vend. App. No. 19.

[4] Banks *v.* Sutton, 2 P. Wms. 700; ante, §§ 8–11.

sidered as a contract on the part of the wife, therefore equity should supply it, the answer is, equity, where there is a valuable consideration, will supply form. But hath she contracted for this particular estate? No; for nothing but what the marriage implies, which is, that she shall have dower of what she is dowable by law, and then the question comes to this, whether she is dowable by law of a trust?" "The case of Bottomley *v.* Fairfax, Preced. in Canc. 336,[1] before my Lord Harcourt," he remarked again, "is an express authority that a wife is not dowable of a trust estate of inheritance; and to this it may also be added, that it is the general received opinion of every one who has attended this bar constantly, that they are not; and it is the practice to make purchases in the name of the purchaser and trustee—but to what intent or purpose? Only to prevent dower, that by there being a survivor to the purchaser, his wife might not be entitled to it. But if it should be ruled that a wife is entitled to a dower of a trust estate of inheritance, provisions of this kind would be overthrown. I mention this because it is hinted at, as if the practice of conveyancers was not of great weight; and truly it is not in their power to alter the law; but when there is a received opinion, and conformity of contracts and settlements thereon, it is extremely dangerous to shake it, which would disturb the possession of many who are very quiet, and think themselves very secure; therefore it ought to be done only on the clearest and plainest ground. In the present case I can not say they are mistaken, because they have gone on this ground, that trusts are now what uses were at the common law, where a wife was not dowable of a use."[2]

14. It will be noticed that the distinction taken by Sir Joseph Jekyll,[3] between a trust created by the husband and a trust created by a third person, was not adverted to in either of the foregoing cases. But in Godwin *v.* Winsmore,[4] it was expressly referred to by Lord Hardwicke: "It is an established doctrine now," he observed, "that a wife is not dowable of a trust estate. Indeed, a distinction is taken by Sir Joseph Jekyll, in Banks *v.* Sutton, 2 P. W. 707, 709, in regard to a trust where it descends, or comes to the husband from another, and is not created by himself; but I think there is no ground for such a distinction, for it is going on suppositions which

[1] Ante, § 7.

[2] Attorney-General *v.* Scott, Forrest. 138; Sugden, Vend. and Pur. App. No. 19.

[3] Ante, § 9.

[4] Godwin *v.* Winsmore, 2 Atk. 525, decided in 1742.

hold on both sides."[1] And in Burgess *v.* Wheate, Sir Thomas Clarke said that the distinction made by Sir Joseph Jekyll was founded on too precarious reasoning to go upon. "The husband," he added, "*found* the estate subject to the trust created by the ancestor; who can say that he intended the wife to be dowable? who can say that if he had not found the estate under a trust, he would not have created such a trust?"[2]

15. Under the pressure of this current of authority, it became the settled doctrine of the English Courts of Chancery that the estate of a *cestui que trust* was not liable to dower. In Dixon *v.* Saville, which was a proceeding for dower in an equity of redemption, it was held by Lord Loughborough and the other lords commissioners, without hearing counsel on behalf of the heirs, that the widow was not dowable, upon the ground that an equity of redemption is nothing more than a trust estate.[3] The point was ruled in the same way in Williams *v.* Lambe.[4] And in Gulston *v.* Gulston, the doctrine that a wife is not dowable of a trust was carried to its utmost limit. It was there held that the fact that the husband had obtained a decree directing the trustees to convey to him the legal estate, would not change the case, nor entitle the wife to dower.[5]

16. The ground upon which Sir Joseph Jekyll more particularly placed his decision in Banks *v.* Sutton,[6] namely, that where there is a time limited for conveying the legal estate, and that time expires

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[1] Lord Hardwicke adds that Attorney-General *v.* Scott is an authority in direct contradiction to this distinction, but this seems to be going further than that case will warrant. It is true the estate out of which dower was claimed was not created by the husband, but the attention of the chancellor does not appear to have been called to the point, nor did he take any notice of it. He refers, however, in terms of approval, to the conclusion of Sir Joseph Jekyll, in so far at least as the latter places his decision upon the ground that the case was to be treated as if the conveyance to the husband had actually been made as directed by the will. And Lord Alvanley, in Curtis *v.* Curtis, Bro. C. C. 620, says that "Attorney-General *v.* Scott did not mean to find fault with Banks *v.* Sutton." See, also, 2 Powell on Mortg., 4th ed. 781.

[2] Burgess *v.* Wheate, 1 W. Bl. R. 138.

[3] Dixon *v.* Saville, 1 Bro. C. C. 326, in 1783; post, ch. 22.

[4] Williams *v.* Lambe, 3 Bro. C. C. 264.

[5] Gulston *v.* Gulston, per Master of the Rolls, 16 July, 1792, 2 Fonb. Eq. 100; Frazier's note H., Vernon's case, 4 Co. 1, b. And see ex parte Bell, 1 Glyn & J. 282; Co. Litt. 208, a., note 1; 1 Roper, Husb. and Wife, (32 Law Lib.) 354, note; Exton *v.* St. John, Rep. temp. Finch, cited 9 Vin. Ab. 226, pl. 54; 9 Vin. Ab. 229, pl. 12; Ray *v.* Pung, 5 B. & Ald. 561.

[6] Banks *v.* Sutton, 2 P. Wms. 700; ante, § 10.

in the lifetime of the husband, there, without reference to the general question of dower out of trust estates, the wife shall be dowable upon the principle in courts of equity, "that when an act is to be done by a trustee, that is to be looked upon as done which ought to be done," does not appear ever to have been directly overruled, unless it be in the case of Gulston *v.* Gulston, just referred to. Its correctness, however, has been seriously called in question on more than one occasion. Mr. Park remarks that the doctrine upon which Sir Joseph Jekyll proceeded, is generally considered as overruled, and that it does not seem to have ever been much relied on.[1] In Crabtree *v.* Bramble, in discussing the question of the right of dower in money directed to be laid out in lands, Lord Hardwicke observes, though without reference to Banks *v.* Sutton, that "it must be allowed, equity follows the contracts of parties, in order to preserve their intent by carrying it into execution, and depends on this principle, that what has been agreed to be done for valuable consideration, is considered as done, and holds in every case *except in dower.*"[2] So in Curtis *v.* Curtis, Lord Alvanley says: "It is now too late to contend that the widow can have her dower out of any estate *in which her husband had not the legal fee;* for Banks *v.* Sutton is not now to be supported, not that there appears to have been any decision directly contradicting it, for Attorney-General *v.* Scott did not mean to find fault with Banks *v.* Sutton. However, it is now a settled point."[3] In neither of these cases, however, was the point presented for adjudication, and the remarks above quoted can only be regarded as expressing the individual opinions of the judges making them. In the United States the distinction relied on by Sir Joseph Jekyll in respect of the right to demand the legal estate, has frequently been approved and applied in practice.[4]

17. Although the equity judges of England eventually yielded a reluctant assent to the rule which denied dower in a trust estate, while it permitted tenancy by the curtesy to attach thereon, but few of them have attempted to vindicate it upon principle. Some, indeed, have endeavored to do so, but the substantial and predominating ground upon which it was finally established by the English Courts of Chancery, is that suggested by Lord Talbot in Chaplin

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[1] Park, Dow. 136.

[2] Crabtree *v.* Bramble, 3 Atk. 687.

[3] Curtis *v.* Curtis, Bro. C. C. 620. To the same effect is D'Arcy *v.* Blake, 2 Sch. & Lef. 388.

[4] Post, § 20.

v. Chaplin and Attorney-General *v.* Scott,[1] and more tersely and effectively stated by Lord Redesdale in D'Arcy *v.* Blake. "The difficulty," he observed, "in which the courts of equity have been involved, with respect to dower, I apprehend, originally arose thus: They had assumed, as a principle, in acting upon trusts, to follow the law; and according to this principle, they ought, in all cases where rights attached on legal estates, to have attached the same rights upon trusts, and consequently, to have given dower of an equitable estate. It was found, however, that in cases of dower, this principle, if pursued to the utmost, would affect the titles to a large proportion of the estates in the country; for that parties had been acting, on the footing of dower, upon a contrary principle, and had supposed, that by the creation of a trust, the right of dower would be prevented from attaching. Many persons had purchased under this idea, and the country would have been thrown into the utmost confusion, if courts of equity had followed their general rule, with respect to trusts in the cases of dower. But the same objection did not apply to tenancy by the curtesy; for no person would purchase an estate subject to tenancy by the curtesy, without the concurrence of the person in whom that right was vested. This I take to be the true reason of the distinction between dower and tenancy by the curtesy. It was necessary for the security of purchasers, of mortgagees, and of other persons taking the legal estates, to depart from the general principle in case of dower; but it was not necessary in the case of tenancy by the curtesy."[2] Here, then, is presented the true reason upon which the rule rests. It became necessary to sacrifice consistency of principle to the security of titles; the existence of an anomalous distinction being regarded as of less importance than the extensive mischiefs which would have been produced by disregarding a practice that had been applied to a large proportion of the titles in the kingdom.[3] And thus the law remained in England until the passage of the dower act of 3 & 4 William IV. chapter 105.

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[1] Chaplin *v.* Chaplin, 3 P. Wms. 229; ante, § 12; Attorney-General *v.* Scott, Forrest. 138; 3 Sugden, V. and P. App. No. 19; ante, § 13.

[2] D'Arcy *v.* Blake, 2 Sch. & Lef. 387–9, quoted at length with approbation in the recent case of Smith *v.* Adams, 5 De Gex, McNaghten & Gordon, p. 712.

[3] Park, Dow. 126. Blackstone says that trust estates were not subjected to dower "more from a cautious adherence to some hasty precedents, than from any well-grounded principle." 2 Bl. Com. 337.

Dower in trust estates under statute of 3 & 4 *William IV. chapter* 105.

18. By this enactment, it is provided "that, when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy,) then his widow shall be entitled in equity to dower out of the same land."[1] This law, which applies, however, to such marriages only as are contracted since January 1st, 1834,[2] completely abolishes the distinction, in respect of the right of dower, between legal and equitable estates.

Dower in the estate of the cestui que trust in the United States.

19. The English Statute of Uses is substantially adopted in South Carolina, Illinois, and Missouri.[3] And in Delaware, by force of their statute, the legal estate, in all cases, accompanies the use and passes with it.[4] So in Rhode Island.[5] In other States, similar enactments have been made, but they embrace within their operation conveyances in trust, as well as conveyances to uses, as practiced before the Statute of Uses. Thus, in New York it is provided that the person entitled to the possession and receipt of the profits of lands shall be deemed to have the legal estate to the same extent as the equitable interest.[6] In Indiana it is enacted that "a conveyance or devise to a trustee whose title is nominal only, and who has no power of disposition or management of such lands, is void as to the trustee, and shall be deemed a direct conveyance or devise to the beneficiary."[7] In Michigan, uses and trusts, except in a modified form, are abolished, and every disposition of lands is required to be made directly to the person intended to be invested with the right to the beneficial enjoyment. "If made to one or more persons in trust

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[1] 3 & 4 Will. IV. ch. 105, § 2. See Appendix.
[2] Ibid. § 14.
[3] 1 Greenl. Cruise, 340, note; ante, ch. 12, § 29.
[4] Ibid. Rev. St. Del. 1829, p. 89, § 1.
[5] Rev. St. R. I. 1844, p. 260.
[6] 2 Rev. St. N. Y. 3d ed. p. 18; 2 Washb. Real Prop. 212; ante, ch. 12, § 29.
[7] 1 Rev. St. Ind. 1852, p. 503, § 13.

for, or to the use of another, no estate or interest, legal or equitable, shall vest in the trustee." This provision, however, is subject to certain qualifications not necessary to be here noticed.[1] In States where statutes of this character have been adopted, it would seem that no question as to the right of dower in the estate of the *cestui que trust* could well arise. His interest, by virtue of these enactments, becomes instantaneously transmuted into a legal estate.[2]

20. In some States the rule of the common law, excluding dower from the estate of the *cestui que trust*, prevails. With the exception of Pennsylvania, this is supposed to be the case in all those States where that rule is not changed by statute. The following named States may be embraced in this class: Massachusetts,[3] Maine,[4] New Hampshire,[5] Connecticut,[6] Vermont,[7] Georgia,[8] Florida,[9] Minnesota,[10] Michigan,[11] South Carolina,[12] Wisconsin,[13] Oregon,[14] Delaware,[15] and Arkansas.[16] In the District of Columbia, also, before

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[1] 2 Comp. Laws Mich. 1857, 824, ch. 86.

[2] For a discussion of the doctrine of uses as applied in the United States, see 2 Washb. Real Prop. 142–56.

[3] Rev. Stat. Mass. 409, § 1; Genl. Stat. Mass. (1860,) 469, § 1.

[4] Rev. Stat. Maine, 1840–41, 891, § 1; Rev. Stat. Maine, (1857,) p. 605, § 1; Hamlin *v.* Hamlin, 19 Maine, (1 App.) 141; Mann *v.* Edson, 39 Maine, 25; Freeman *v.* Freeman, Ibid. 426; Thorndike *v.* Spear, 31 Maine, 91; Kidder *v.* Blaisdell, 45 Maine, 461.

[5] Comp. Stat. N. H. 1853, ch. 175, § 3.

[6] Stat. Conn. 1838, p. 188; 1 Swift's Dig. 85; Conn. Comp. Stat. 1854, p. 382, § 17; Deforest's Appeal, 1 Root, 50; Calder *v.* Bull, 2 Root, 50; Stewart *v.* Stewart, 5 Conn. 317; Stedman *v.* Fortune, Ibid. 462.

[7] Stat. Verm. 1799; Verm. Rev. Stat. 289; Comp. Stat. Verm. p. 362; Thayer *v.* Thayer, 14 Verm. 107; Ladd *v.* Ladd, Ibid. 185. See Gorham *v.* Daniels, 23 Verm. 600; Jenny *v.* Jenny, 24 Verm. 324.

[8] Stat. Geo. Dec. 23d, 1826; Cobb's Dig. 171; Prince's Dig. 249; ed. 1838, p. 253; Stat. 1842, p. 75; Chapman *v.* Schroeder, 10 Geo. 321; Green *v.* Causey, Ibid. 435; Bowen *v.* Collins, 15 Geo. 100; Hart *v.* McCollum, 28 Geo. 478; Aaron *v.* Bayne, Ibid. 107.

[9] Thompson's Dig. 2 Divis., tit. 1, ch. 2, § 1.

[10] Stat. Minn. 1858, p. 407, § 1.

[11] 2 Comp. Laws Mich. 1857, p. 850, § 1. See May *v.* Specht, 1 Mann. 187; Campbell *v.* Clark, 2 Doug. Mich. R. 141; May *v.* Rumney, 1 Mich. R. 1.

[12] 1 Brev. Dig. p. 268, tit. 67; Secrest *v.* McKenna, 6 Rich. Eq. 72. See Speight *v.* Meigs, 1 Brevard, 486; Peay *v.* Peay, 2 Rich. Eq. 409.

[13] Rev. Stat. Wis. (1849,) p. 333, § 1; Revision of 1858, p. 545, § 1.

[14] Stat. Oregon, (1855,) p. 405, § 1.

[15] Laws of Del. (1829,) p. 167, § 2.

[16] Ark. Rev. Stat. (1838,) ch. 52, § 1; Dig. Stat. Ark. (1848,) p. 445, § 1; Dig. Stat. Ark. (1858,) p. 450, § 1. See, also, post, ch. 20, § 3.

the Revised Code, the common law was held to be in force.[1] But in many of the States the rule of the common law in this particular is greatly changed, and in others it is entirely abrogated. Thus, where the equity of the husband is perfect and complete, and his interest is of such character that if it were a legal estate it would be subject to dower at common law, the right of the widow to be endowed thereof is recognized in the following States: Virginia,[2] Kentucky,[3] New Jersey,[4] Pennsylvania,[5] Alabama,[6] and Mississippi.[7] Under the present statute the rule is the same in the District of Columbia.[8] So, in New York,[9] Maryland,[10] North Carolina,[11]

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[1] Stelle *v.* Carroll, 12 Peters, 201.

[2] Stat. Va. 1785 and 1792; Tate's Dig. p. 175; Va. Code, 1849, p. 474, § 1; Rowton *v.* Rowton, 1 Hen. & M. 92; Claiborne *v.* Henderson, 3 Hen. & M. 322; Wheatley *v.* Calhoun, 12 Leigh, 264; Blair *v.* Thompson, 11 Gratt. 441.

[3] 1 Rev. Stat. Ky. 572, note 2; Rev. St. 1852, p. 393, art. 4, § 3; Stanton's Rev. vol. ii. p. 22; Pugh *v.* Bell, 2 Mon. 126; Stevens *v.* Smith, 4 J. J. Marsh. 64; Dean *v.* Mitchell, Ibid. 451; Hamilton *v.* Hughes, 6 J. J. Marsh. 581; Lindsey *v.* Stevens, 5 Dana, 104; Brewer *v.* Van Arsdale, 6 Dana, 204; Robinson *v.* Miller, 1 B. Mon. 88, 91. And see Heed *v.* Ford, 16 B. Mon. 114; Gully *v.* Ray, 18 B. Mon. 107; Lawson *v.* Morton, 6 Dana, 471.

[4] N. J. Rev. Laws, p. 397; Rev. Stat. 1847, p. 71, ch. 4, § 1; Elmer's Dig. 147, note; Nixon's Dig. p. 209, § 1; Yeo *v.* Mercereau, 3 Harr. 387; Dennis *v.* Kiernan, Nixon's Dig. 212, note.

[5] Shoemaker *v.* Walker, 2 Serg. & R. 554; Reed *v.* Morrison, 12 Serg. & R. 18; Kelly *v.* Mahan, 2 Yeates, 515; Jones *v.* Patterson, 12 Pa. St. 149, 154; Pritts *v.* Ritchey, 29 Pa. St. 71, 76; Dubs *v.* Dubs, 31 Pa. St. 149. And see Junk *v.* Canon, 34 Pa. St. 286.

[6] Laws Ala. 247, § 9; Clay's Dig. 157, § 36; Code, 1852, § 1354; Shields *v.* Lyon, Minor, 278; Gillespie *v.* Somerville, 3 Stew. & Port. 347; Edmonson *v.* Montague, 14 Ala. 370; Allen *v.* Allen, 4 Ala. 556; Crabb *v.* Pratt, 15 Ala. 843; Parks *v.* Brooks, 16 Ala. 529.

[7] Rev. Code Missis. (1824,) p. 232, § 7; Hutchinson's Missis. Code, p. 622, § 7; Howard & Hutch. Dig. p. 353, § 47; Rev. Code Missis. (1857,) p. 468, art. 167. See James *v.* Rowan, 6 S. & M. 398.

[8] Rev. Code Dist. Col. (1857,) p. 199, § 2.

[9] 2 Rev. Stat. N. Y. p. 112, §§ 71, 72; Ibid. 374, §§ 63, 64; 3 Rev. Stat. 5th ed. p. 200, §§ 84, 85; Johnson *v.* Thomas, 2 Paige, 377; Hawley *v.* James, 5 Paige, 318; Church *v.* Church, 3 Sandf. Ch. 434. See Coster *v.* Clarke, 3 Edw. Ch. 428; McCartee *v.* Teller, 2 Paige, 511.

[10] Dorsey's Laws, vol. i. p. 701, § 10; Act of 1818, ch. 193; 1 Md. Code, (1860,) p. 325, art. 45, § 5; Hopkins *v.* Frey, 2 Gill, 359; Miller *v.* Stump, 3 Gill, 304; Spangler *v.* Stanler, 1 Md. Ch. Dec. 36; Bowie *v.* Berry, 1 Md. Ch. Dec. 452; Bowie *v.* Berry, 3 Md. Ch. Dec. 359; Purdy *v.* Purdy, 3 Md. Ch. Dec. 547; Steuart *v.* Beard, 4 Md. Ch. Dec. 319.

[11] 1 Rev. Stat. N. C. p. 614, § 6; N. C. Code, (1854,) p. 602, ch. 118, § 6; Thompson *v.* Thompson, 1 Jones' N. C. Law R. 430; Klutts *v.* Klutts, 5 Jones' N. C. Eq. R. 80.

Ohio,[1] Indiana,[2] Illinois,[3] Iowa,[4] Rhode Island,[5] Tennessee,[6] Missouri,[7] and Kansas,[8] dower is allowed in equitable estates. And it is not required in all these States that the equity of the husband shall be complete, but in some of them the widow may claim dower subject to prior equities or incumbrances, to the extent of the actual interest of the husband in the lands at the time of his death.[9]

21. The introduction of the English doctrine into Virginia was strongly resisted by some of the most eminent of the judges of that State. As early as 1755, in the old General Court, with the attorney-general of counsel upon the one side, and Mr. Pendleton upon the other, the question was argued whether a widow should have dower of an equitable estate in a case where the husband died after the time limited for conveying to him the legal title. And with the exception of P. Randolph, J., the court were unanimously of opinion that she was entitled to dower, and decreed accordingly.[10] Again, in Claiborne *v.* Henderson,[11] Wythe, Chancellor, made a similar decree; and on appeal, Tucker, J., in an opinion of great ability, insisted that the English rule was never in force in Virginia, and that consequently equitable estates were subject to dower in that commonwealth before the adoption of their statute upon the subject.

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[1] Swan's Stat. (1841,) p. 296, § 1; Swan's Stat. (1854,) p. 829, § 1; 1 Swan & Critch. p. 516, § 1; Smiley *v.* Wright, 2 Ohio, 506; Miller *v.* Wilson, 15 Ohio, 108; Rands *v.* Kendall, Ibid. 671; McDonald *v.* Aten, 1 Ohio St. 298.

[2] Rev. Code, 1824, p. 157, § 1; Rev. Code, 1831, p. 209, § 12; Rev. Stat. 1843, p. 428, §§ 80–84; McMahan *v.* Kimball, 3 Blackf. 1, 10; Smith *v.* Addleman, 5 Blackf. 406; Taylor *v.* McCrackin, 2 Blackf. 260, 262; Crane *v.* Palmer, 8 Blackf. 120; Malin *v.* Coult, 4 Ind. 535.

By the 1 Rev. Stat. 1852, p. 251, the widow takes a share of the husband's estate in fee simple, instead of a life estate, as before.

[3] Rev. Stat. 1833, p. 627; Rev. Stat. 1839, p. 698, § 49; Act of March 3d, 1845, § 1; 1 Purple's Dig. p. 494, ch. 2, Dower; Rev. Stat. 1856, p. 496, ch. 34, § 1; Gale's Stat. 697; 1 Stat. Ill. (1858,) p. 151, § 1; Davenport *v.* Farrar, 1 Scam. 314; Sisk *v.* Smith, 1 Gilm. 503; Owen *v.* Robbins, 19 Ill. 549.

[4] Revision of 1860, p. 420, § 2477.

[5] Public Laws R. I. (1844,) p. 188, § 1; Rev. Stat. (1857,) ch. 202, § 1.

[6] Stat. Laws Tenn. (1836,) p. 265, § 4; Act of 1823, ch. 37; Code of Tenn. (1858,) p. 473, § 2398.

[7] Stat. Misso. (1835,) p. 228, § 1; Revision of 1845, p. 430, § 1.

[8] Stat. Kansas Ter. (1855,) p. 314, § 1; Comp. Laws Kansas, (1862,) p. 478, § 1.

[9] See further upon this subject, post, ch. 20, §§ 37–44.

[10] Dobson *v.* Taylor, April General Court, 1755, John Randolph's MS. Rep. p. 77; stated in Claiborne *v.* Henderson, 3 Hen. & M. 335. See, also, p. 362.

[11] Claiborne *v.* Henderson, 3 Hen. & M. 322, (1809.)

But Judges Roane and Fleming were of a contrary opinion, and the decree of the chancellor was reversed.[1] In that State, however, the question was set at rest as to rights accruing after 1785, by the adoption of the statute of that date, which contained the following provision:—

> Where any person to whose use, or in trust for whose benefit another is, or shall be seized of lands, tenements or hereditaments, hath, or shall have, such inheritance in the use or trust as that if it had been a legal right, the husband or wife of such person would thereof have been entitled to curtesy or dower, such husband or wife shall have and hold, and may, by the remedy proper in similar cases, recover curtesy or dower of such lands, tenements, or hereditaments.[2]

This is the first statute giving dower in equitable estates, adopted in the United States. It was subsequently re-enacted in Kentucky,[3] Mississippi,[4] and Alabama,[5] without any change in the phraseology.

22. The New Jersey statute of 1799 gave dower "of all the lands, tenements, and other real estate whereof the husband, *or any other to his use*, was seized of an estate of inheritance at any time during the coverture," to which the wife had not relinquished her right.[6] In the first reported case that arose in the State after the passage of this act, involving its construction, it was held by a majority of the court that it introduced no new principle, but left the doctrine as to dower in equitable estates precisely where it found it, and where it stood at the common law as altered by the 27 Henry VIII. "A doubt, then," the court observed, after quoting a portion of the English statute just referred to, "might reasonably arise in the mind of the penman of this act concerning dower, whether the *cestui que use* under an act for transferring uses into possession, was so seized as that his wife should be dowable of the estate, and in order to obviate that doubt, his prudence and caution led him to adopt the phraseology which he has used."[7] But Southard, Judge, dissented from the conclusion of the majority, and held that it was plainly intended by the statute to modify the strict rule of the common law. "As it had been determined," he said, "that a use was not subject to dower before the

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[1] See, also, Rowton v. Rowton, 1 Hen. & M. 92.

[2] Va. Laws 1785, ch. 62, 12 Hen. Stat. at Large, 157.

[3] 1 Dig. Laws Ky. 815, § 14, (1796.)

[4] Dig. Stat. Missis. Ter. p. 82, § 9, (1812); Rev. Code Missis. (1857,) p. 468, art. 167.

[5] Clay's Ala. Dig. p. 157, § 36.

[6] Laws of N. J. by Paterson, p. 348, § 1.

[7] Montgomery v. Bruere, 1 South. 260, (1818.)

statute, nor a trust after it; and as an equity had been likened to a trust, may it not have been the object of making a use dowable, to make a trust and equity so also? May not those words have been designed to break down this artificial reasoning, and give dower in all cases, both of legal and equitable seizin, wherever the husband in truth owned the land, and the use and profits belonged to him?" Upon error to the court above, the reasoning of the dissenting judge prevailed, and the judgment below was reversed.[1] The question again came up, and was elaborately discussed in Yeo *v.* Mercereau,[2] where the doctrine of the Court of Errors was affirmed. "Why may not those words," said the chief justice, (referring to the phrase, "or any other to his use,") "have been inserted for the purpose of giving the widow dower of the lands in all cases where any person is so seized to the use of the husband as in equity would entitle him to the legal estate, and the actual possession and seizin of the land itself; in other words, wherever the husband is the true and legal owner in equity of the *land* itself? Such cases may exist, for instance, upon a covenant to stand seized to the use of the husband, and to convey, &c. upon request. Or again; suppose the husband makes a purchase, and pays the money, but dies before he gets a conveyance; or suppose another person buys land with the husband's money, and for him, but takes a deed to himself in fee; in either case the husband is the true owner of the land. The vendor in the first case, and the agent or purchaser in the second, stands seized to the use of the husband, and in equity he is entitled to a conveyance in fee. If, before such conveyance made, or pending a bill to obtain one, the husband should die, why should not his widow have dower of such lands? I see no reason why she should not; and in my opinion the words 'or any other to his use,' were inserted to reach just such cases, and all others, if any exist, in which another is seized of lands during coverture, to the use of the husband under such circumstances as in equity entitles the husband, or his heirs, to a conveyance of the legal estate, and actual seizin and possession of the land."

23. The English doctrine was never adopted in Pennsylvania. In Shoemaker *v.* Walker,[3] Tilghman, C. J., refers to the subject in the

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[1] Montgomery *v.* Bruere, 2 South. 685.

[2] Yeo *v.* Mercereau, 3 Harr. 387, (1842.)

[3] Shoemaker *v.* Walker, 2 Serg. & R. 554, (1816.)

following terms: "In England a widow is not dowable of a trust estate, although a husband may be tenant by the curtesy. This is the more remarkable, as dower is the favorite of the common law. A woman has her dower where the husband had only a seizin in law, but a man can not be tenant by the curtesy unless there was a seizin in fact. No good reason has been assigned for excluding the wife of her dower in a trust estate. It rests upon usage, which, though not now approved, can not be altered by any authority less than the Parliament. In Pennsylvania, the usage has been more reasonable and more analogous to the general principles of dower. I do not know that the question has ever been brought to a decision in this court. The reason of this I take to be, that it has never been doubted. I have frequently heard it taken for granted, but never seriously questioned. I do not understand that the learned counsel who now makes the point, supposes the law to be in his favor. But he wishes it to be settled by a solemn decision. It is my opinion that it should be so. My opinion is, that by the usage and law of Pennsylvania, a widow is dowable of a trust estate."[1]

24. In some States the courts have declared in general terms that in order to entitle the wife to dower in the equities of her husband, his right in the lands must be of such a nature as to entitle him to demand, and authorize a court of equity to decree, a conveyance of the legal title.[2] There is, however, a manifest distinction between an express trust created by deed or will, and a trust or equity resulting to the purchaser of lands under an executory contract. Where, under a statute giving, in general terms, dower in the estate of the *cestui que trust*, the courts, by construction, extend its operation to the case of an ordinary purchase of lands, treating the vendor as holding the legal title in trust for the vendee, and thus making the widow of the vendee dowable,[3] it may not be unreasonable to require that the purchase money shall be fully paid, and the equity of the husband rendered complete, before allowing dower to attach. But where, as by the Virginia act above quoted,[4] the estate of the beneficiary of an *express* trust is made subject to dower without limitation or qualification, it would seem that the courts are not authorized to interpolate a condition making it a requisite of dower,

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[1] See, also, authorities cited ante, p. 384, note 5; and see ch. 20, §§ 18–21.

[2] See post, ch. 20, §§ 37–44.

[3] See ch. 20, §§ 12–14.

[4] Ante, § 21.

that the beneficiary of such a trust shall be entitled to a conveyance of the legal estate. It often happens, in the creation of trusts of this character, that the estate is so limited as to be absolutely beyond the control of the *cestui que trust;* and in such case, therefore, the application of the doctrine above stated would exclude dower, although the case clearly came within the plain provisions of the statute.

25. It is also understood to be the general rule in those States where dower is allowed in equities, that the right is restricted to such equitable estates as the husband held at the time of his death. That this is the rule with respect to equitable interests acquired under executory contracts of purchase, is well settled by the authorities.[1] And where—as is the case in some States—dower is given in general terms, in such equitable estates, only, as the husband was possessed of at his death, and no distinction is made between equities arising upon contracts of purchase and those created under express trusts, the same general rule would seem to apply to all equitable estates, no matter how created. But it is very questionable whether, under provisions such as are contained in the Virginia act, and in the statutes of several of the other States, a husband who takes as the beneficiary of an express trust, has the power to defeat his wife's dower by an alienation of his estate during the coverture. The reasons assigned for permitting a transfer of an equitable title held by purchase, unincumbered by dower, do not apply where the husband takes as the *cestui que trust* of an express trust.[2] These views are particularly applicable to the present statute of Kentucky, the third section of which provides that "after the death of the husband, the wife shall be endowed for her life, of one-third of the real estate whereof *he*, or any one for *his use*, was seized of an estate in fee simple at *any time* during the coverture, unless her right to such dower shall have been barred, forfeited, or relinquished."[3] Here, estates of which the husband was himself seized, and those of which any other person was seized for his use, are placed upon the same

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[1] Ch. 20, §§ 45–49; 1 Washb. Real Prop. 180, § 14.

[2] See Hamilton *v.* Hughes, 6 J. J. Marsh. 581; Heed *v.* Ford, 16 B. Mon. 114.

[3] 2 Ky. Rev. St. by Stanton, ch. 47, art. 4, § 8. See, also, Code of Va. (1849,) p. 474, § 1; Nixon's Dig. Laws of N. J. p. 209, § 1; Laws of Iowa, Rev. of 1860, p. 420, § 2477; Rev. Stat. R. I. (1857,) p. 503, § 1; Rev. Stat. Misso. (1845,) p. 430, § 1; Comp. Laws Kansas, (1862,) p. 478, § 1, where similar language is employed in giving dower in the estate of the *cestui que use*.

footing, and in either case, a seizin at *any time* during the coverture is sufficient to confer dower. By the thirteenth section of the same act it is provided that "if the husband held land by executory contract, *only*, the wife shall not be endowed of the land unless he owned such equitable right at his death." This section, limiting the husband's power of alienation to lands held by executory contract, when taken in connection with the previous section, would seem to indicate that, in Kentucky at least, dower in equitable estates created by express trust is not liable to be defeated by the individual act of the husband. And it is supposed that a like construction may properly be given to the statutes of several of the other States.

Reversionary estate of cestui que trust.

26. The doctrine of the common law which prevents dower from attaching upon estates in remainder or reversion expectant upon an estate of freehold,[1] applies to *equitable* as well as to legal estates; and during the existence of the particular estate the husband may defeat his wife's dower by disposing of his reversionary interest. Thus, where a remainder in fee of a trust estate was vested in the husband, dependent on the life of a third person, and the husband aliened such remainder during the coverture, and before the determination of the particular estate, it was held that his wife was not entitled to dower.[2]

Disseizin of cestui que trust.

27. In the case of Thompson *v.* Thompson,[3] there is a dictum to the effect that if the *cestui que trust* be divested of his equitable seizin by any act equivalent to a *disseizin* of the legal estate at common law, he must, by analogy to the rules of the common law, reinvest himself with his equitable seizin, or the dower of his wife will be defeated.[4] "This distinction," the court said, incidentally referring to the principles of the common law by way of illustration, "which appears where the widow claims dower at common law, is equally applicable where she claims under the statute. For instance,

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[1] Ante, ch. 11, § 5; ch. 15, §§ 1–6.

[2] Shoemaker *v.* Walker, 2 Serg. & Rawle, 554.

[3] Thompson *v.* Thompson, 1 Jones' N. C. Law R. 480.

[4] See ante, ch. 12, §§ 12–15.

if a trustee sells the land in violation of the trust, and the *cestui que trust* marries and dies without revesting his estate, the widow is not entitled to dower; for he had a mere right to apply to a court of equity, and have the purchaser declared a trustee, if he bought with notice; but as he did not in his lifetime assert this right, although his heir may do so after his death, it was not intended to give the widow a claim to dower. Indeed, it could not be done without destroying all analogy between a legal and equitable estate, which the intention was to put on the same footing. So if a trustee uses money belonging to the trust fund, and invests it in land, although the *cestui que trust* may, in equity, follow the fund and claim the land, yet until he does so he has a mere right, not an estate."[1]

28. In some of the States the foregoing doctrine may possibly hold good, but it is clear that in many of them it would receive no countenance whatever. It is founded solely on the technical rule of the common law that a mere right of entry upon lands is not sufficient to give dower. This rule, as we have seen, is now abrogated by statute in England,[2] and in several of the States, and in others never was received as American law.[3] It would be strangely inconsistent with principle, therefore, to hold, in conformity to the general American doctrine, that a disseizin of the legal estate does not affect dower, and at the same time apply to a constructive disseizin of the equitable estate the severe and rigid rules of the common law. This point was expressly determined in the case of Yeo *v.* Mercereau.[4] There the purchaser in possession derived title through the trustee, with notice of the equitable rights of the *cestui que trust*, and the widow of the latter was held entitled to dower. "The defendant," the court said, "having purchased with full notice of the history of the title, apprised, as appears by the state of the case, of the demandant's claim to dower, and having withheld a large portion of the purchase money as an indemnity against the claim, ought not now to be permitted to deny the husband's right to the land, any more than he would be to deny his seizin if he had received his deed directly from the husband himself."

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[1] 1 Washb. R. P. 181, § 15, is to the same effect.

[2] Ante, ch. 12, § 18.

[3] Ante, ch. 12, §§ 19–21.

[4] Yeo *v.* Mercereau, 3 Harr. 387.

Estate of trustee not subject to dower.

29. As the common law takes no notice of the interest of the *cestui que trust*, and regards only the legal estate, it follows that the wife of the trustee may, in the courts of *law*, successfully prosecute her claim to be endowed of the trust property. To avoid this consequence, the practice was early introduced of resorting to the courts of equity to enjoin the wife of the trustee from such proceeding. At first it was doubted whether the chancellor could interfere;[1] but these doubts were soon dissipated, and it eventually became a well-established doctrine, that *in equity* the wife of the trustee is not dowable of the trust estate, and that the courts of equity may interpose to prevent her from asserting a claim to such dower *at law*.[2] This principle of the English equity courts is very generally adopted in the United States.[3]

30. As the vendor of real estate, after a contract of sale, is regarded in equity as a trustee for the purchaser, it follows, upon the principle above stated, that where a sale is made before the marriage, although a conveyance be not executed until afterwards, the wife of the vendor is not entitled to dower.[4]

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[1] Gilb. Uses, 11, 172; 7 Co. 73. See Hardw. 469, per Hale, C. B.; Bro. Feoff. al Uses, pl. 10; Nash *v.* Preston, (6 Car. I.) Cro. Car. 190; Park, Dow. ch. 6.

[2] Bacon's Law Tracts, 87; Noel *v.* Jevon, (1678,) 2 Freem. 43; Bevant *v.* Pope, (1681,) 2 Freem. 71; Hinton *v.* Hinton, 2 Ves. Sr. 634; Casborn *v.* English, 2 Eq. Cas. Abr. 728; Park, Dow. 101; Hill on Trustees, 269; 1 Sugd. V. & P. 9th ed., 9, 358.

[3] Robison *v.* Codman, 1 Sumn. 129; Cooper *v.* Whitney, 3 Hill, 101; Thompson *v.* Murray, 2 Hill, (S. C.) Ch. 204, 213; Powell *v.* Mons. & Brimf. Man. Co., 3 Mason, 347; Cowman *v.* Hall, 3 Gill & John. 398; Stevens *v.* Smith, 4 J. J. Marsh. 64; Small *v.* Procter, 15 Mass. 495; Stanwood *v.* Dunning, 2 Shep. 290; Germond *v.* Jones, 2 Hill, 569; Coster *v.* Clarke, 3 Edw. Ch. 428; Gomez *v.* Tradesmen's Bank, 4 Sand. S. C. 102; Herron *v.* Williamson, 6 Litt. 250; Lawson *v.* Morton, 6 Dana, 471; Bartlett *v.* Gouge, 5 B. Mon. 152; Dean *v.* Mitchell, 4 J. J. Marsh. 451; Edmondson *v.* Welsh, 27 Ala. 578; Derush *v.* Brown, 8 Ohio, 412; Firestone *v.* Firestone, 2 Ohio State R. 415; McNish *v.* Pope, 8 Rich. Eq. 112; Crittenden *v.* Johnson, 6 Eng. Ark. R. 94; Lenox *v.* Notrebe, 1 Hemp. 251; James *v.* Rowan, 6 Smedes & Marsh. 393; 4 Kent, 43; 1 Washb. Real Prop. 162, § 14.

[4] Park, Dow. 106; 1 Roper, Husb. and Wife, by Jacob, 358; Dean *v.* Mitchell, 4 J. J. Marsh. 451; Oldham *v.* Sale, 1 B. Mon. 76; Gaines *v.* Gaines, 9 B. Mon. 295; Rawlings *v.* Adams, 7 Md. 26; Bowie *v.* Berry, 3 Md. Ch. Decis. 359; Cowman *v.* Hall, 3 Gill & J. 398; Firestone *v.* Firestone, 2 Ohio St. 415; Adkins *v.* Holmes, 2 Carter, (Ind.) 197; Kintner *v.* McRae, Ibid. 453. See, also, ch. 28, §§ 15–21, where this subject is more fully considered.

31. Where a testator by his will devised to his brother all his real and personal property, in trust, to sell the same, and out of the proceeds to pay debts and legacies, and the residue the brother to retain to his own use, but the will did not, in terms, authorize the latter to take the lands into his own possession, nor to receive the rents and profits, it was held that under the laws of New York he took no estate in the lands; that the will conferred on him a mere power in trust to make sales and apply the proceeds as directed thereby, and that on the death of the testator the lands descended to his heirs, subject to the execution of the power. The widow of the trustee was consequently held not dowable of the lands, notwithstanding his interest in the residuum to be produced by sales.[1]

32. Although the wife is not dowable where the husband holds nothing but the dry legal title, without any beneficial interest in the lands, yet if any substantial interest therein be coupled with the legal estate, to that extent it is supposed she would be entitled to dower.[2] And it is clear that where the legal and equitable estate of the husband are coextensive, the latter merges in the former, and confers upon the wife the right of dower.[3]

33. The rule denying dower to the estate of trustees applies, also, where lands are held by the husband under a general power of appointment to uses, even where, in default of appointment, the estate is to be held to his own use in fee. In such case, until the appointment is made, the husband is vested with an estate which is subject to dower, and if he die without having executed the power, the right of the wife will become absolute. But if the appointment be made by him in his lifetime, the estate is thereupon transferred to the appointee under the use discharged from the incumbrance of dower.[4]

34. Where land was conveyed to the husband before marriage by an absolute deed in fee, it was held that a secret parol trust attending the conveyance could not be set up to deprive the wife of dower.[5] And where a trustee purchased the trust property, and the sale was

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[1] Germond *v.* Jones, 2 Hill, (N. Y.) 569.

[2] 4 Kent, 43, 46; Coster *v.* Clarke, 2 Edw. Ch. 428. See Knight *v.* Frampton, 4 Beav. part 1, p. 10; 6 Law Reporter, 90.

[3] Robison *v.* Codman, 1 Sumn. 121; Dean *v.* Mitchell, 4 J. J. Marsh. 451; Coster *v.* Clarke, 3 Edw. Ch. 428; Hill on Trustees, 252, note; 1 Washb. R. P. 162, § 14.

[4] See ante, ch. 14, § 10.

[5] Davidson *v.* Graves, 1 Bailey's Ch. 268.

not impeached by the *cestui que trust*, it was decided that his title was good, and his wife dowable of the lands.[1]

85. And if it be shown to the reasonable satisfaction of a court of equity that the person alleged to be a trustee was in point of fact the *bona fide* owner of the estate, and that the declaration of trust, which is relied on to defeat dower, was simply a contrivance resorted to for the purpose of defeating creditors or others, the court will not suffer this trust to be set up as a bar to dower against the wife of such *bona fide* owner. This conclusion is fairly deducible from the case of Bateman *v.* Bateman.[2] In that case, a father purchased land in the name of his eldest son, who was put in possession, and afterwards falling sick, was induced to execute a declaration of trust for his father, but subsequently recovering, continued in possession, and married, and dying without issue, his brother and heir conveyed to the father. The widow of the eldest son having brought a writ of dower, the father filed his bill in chancery to be relieved against it, and obtained a decree at the rolls; but upon appeal, Lord Keeper Wright dismissed the bill, declaring it to be a secret and fraudulent deed of trust to deceive creditors and purchasers, and that the widow was at liberty to prosecute her writ of dower. It is to be remarked, however, that in this case the declaration of trust was executed before the marriage, and therefore that it was not enough to show that it was voluntary merely, and so fraudulent as against creditors, under the statute. If good as against the party executing it, it was clearly an equitable bar of dower. The lord keeper must consequently have been of opinion that the purchase by the father was intended as an advancement for the son, and that his name was not used as a trustee for the father, and that, under the circumstances, the subsequent declaration of trust did not prove the contrary nor raise any trust in the father's favor, but was a mere contrivance for the purposes of fraud, having no operation even between the parties.[3]

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[1] McNish *v.* Pope, 8 Rich. Eq. 112. [2] Bateman *v.* Bateman, 2 Vern. 436.
[3] Park, Dow. 108.

CHAPTER XX.

DOWER IN EQUITABLE ESTATES ACQUIRED UNDER EXECUTORY CONTRACTS OF PURCHASE.

§ 1–3. Introductory.
4–10. In what States seizin of the legal estate is required.
11–36. In what States dower may be had of equitable estates.
37–44. Whether the equity must be complete.
§ 45–49. The rule requiring the husband to be possessed of the equity at his death.
50–52. The rule where the husband receives the legal title after transferring his equitable estate.

1. We come next to the consideration of the right of dower in such equitable estates as are acquired under executory contracts of purchase, as distinguished from those resulting from uses or trusts expressly declared by deed or will, and which more particularly formed the subject-matter of the preceding chapter.

2. The rule of the common law already frequently referred to, making seizin of the legal estate an essential requisite to the right of dower,[1] was adopted and followed by the English courts of equity, not only with reference to the estate of the *cestui que trust* under an express trust, as shown in the preceding chapter, but was also applied to every description of equitable estate. Before the late dower act the general proposition was maintained in the modern English cases, as well in equity as at law, that dower could only be had of an estate of which the husband possessed the legal title.[2] It has already been shown that in this particular the English rule is now changed by statute.[3] It is held, however, that the statute here referred to has no application to copyhold estates, and that the right to freebench in these estates must depend upon the custom of the manor where they are situate. Accordingly where the purchaser of a copyhold held of a manor, the custom of which entitled the widow of a copyholder to freebench in one moiety of the lands of which the husband died *seized*, took a surrender, but died before admittance,

[1] Ante, ch. 12.
[2] Park, Dow. 136, 137.
[3] 3 & 4 Will. IV. ch. 105, § 2. See Appendix.

it was decided that as his estate was equitable only, his widow was not entitled to freebench at law nor in equity.[1]

3. The English rule, as it existed before the 3 & 4 Will. IV. chapter 105, is adopted in a number of the American States. In others its severity is greatly softened by statutory modifications. In others, again, it is wholly disregarded, and an entirely different doctrine, ignoring to a great extent the distinction between legal and equitable estates, is introduced in its stead.

In what States seizin of the legal estate is required.

4. In Massachusetts,[2] Maine,[3] New Hampshire,[4] Connecticut,[5] Vermont,[6] Georgia,[7] Florida,[8] Minnesota,[9] Michigan,[10] South Carolina,[11] Wisconsin,[12] Oregon,[13] Delaware,[14] and Arkansas,[15] the rule of the common law requiring a seizin of the legal estate, except in the

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[1] Smith *v.* Adams, 5 De Gex, Macnaghten & Gordon's Rep. 712; Powdrell *v.* Jones, 2 Sm. & Gif. 407.

[2] Rev. Stat. Mass. 409, § 1; Gen. Stat. Mass. (1860,) 469, § 1.

[3] Rev. Stat. Maine, 1840–41, 391, § 1; Rev. Stat. Maine, (1857,) p. 605, § 1; Hamlin *v.* Hamlin, 19 Maine, (1 App.) 141; Mann *v.* Edson, 39 Maine, 25; Freeman *v.* Freeman, Ibid. 426; Thorndike *v.* Spear, 31 Maine, 91; Kidder *v.* Blaisdell, 45 Maine, 461.

[4] Comp. Stat. N. H. 1853, ch. 175, § 3.

[5] Stat. Conn. 1838, p. 188; 1 Swift's Dig. 85; Conn. Comp. Stat. 1854, p. 382, § 17; Deforest's Appeal, 1 Root, 50; Calder *v.* Bull, 2 Root, 50; Stewart *v.* Stewart, 5 Conn. 317; Stedman *v.* Fortune, Ibid. 462.

[6] Stat. Verm. 1799; Verm. Rev. Stat. 289; Comp. Stat. Verm. 362; Thayer *v.* Thayer, 14 Verm. 107; Ladd *v.* Ladd, Ibid. 185. See Gorham *v.* Daniels, 23 Verm. 600; Jenny *v.* Jenny, 24 Verm. 324.

[7] Stat. Geo. Dec. 23d, 1826; Cobb's Dig. 171; Prince's Dig. 249; ed. 1838, p. 253; Stat. 1842, p. 75; Chapman *v.* Schroeder, 10 Geo. 321; Green *v.* Causey, Ibid. 435; Bowen *v.* Collins, 15 Geo. 100; Hart *v.* McCollum, 28 Geo. 478; Aaron *v.* Bayne, Ibid. 107.

[8] Thompson's Dig. 2 Divis. tit. 1, ch. 2, § 1.

[9] Stat. Minn. (1858,) p. 407, § 1.

[10] 2 Comp. Laws Mich. 1857, p. 850; Campbell, Appellant, 2 Doug. Mich. R. 141; May *v.* Rumney, 1 Mann. R. 1. See May *v.* Specht, 1 Mann. 187.

[11] 1 Brev. Dig. p. 268, tit. 67; Secrest *v.* McKenna, 6 Rich. Eq. 72. See Speight *v.* Meigs, 1 Brevard, 486; Peay *v.* Peay, 6 Rich. Eq. 409.

[12] Rev. Stat. Wis. (1849,) p. 333, § 1; Revision of 1858, p. 545, § 1.

[13] Stat. Oregon, (1855,) p. 405, § 1.

[14] Laws of Del. (1829,) p. 167, § 2.

[15] Ark. Rev. Stat. (1838,) ch. 52, § 1; Dig. Stat. Ark. (1848,) p. 445, § 1; Dig. Stat. Ark. (1858,) p. 450, § 1; Menifee *v.* Menifee, 3 Eng. 9; Crittenden *v.* Johnson, 6 Eng. 94; Crittenden *v.* Johnson, 14 Ark. 447; Crittenden *v.* Woodruff, 14 Ark. 465; Blakeney *v.* Ferguson, 20 Ark. 547. See, also, ante, ch. 19, § 20.

instance noticed in the two succeeding sections, is retained without essential modification.

5. In *Massachusetts*, although their statute restricts dower to legal estates, it has nevertheless received a liberal interpretation at the hands of the judiciary. Thus, in Hale *v.* Munn,[1] where the grantee entered into possession of a tract of land intended to be conveyed to him by his deed, supposing it to be correctly described therein, when in fact, by mistake, the premises upon which he entered were not included in the conveyance, and he continued in possession until his death, and the land was then sold and conveyed by his administrator by license of court, and the purchaser went into possession under such conveyance, and afterwards, on discovering the mistake, procured a quit-claim deed of the land from the grantor of the deceased, describing it as the same land intended to be conveyed by his deed to the deceased, the court held that the title thus obtained from the original grantor by the purchaser, was a mere confirmation of his previous title, and was intended to give it full effect; thus leaving the title and possession acquired under the administrator's deed undisturbed, and consequently entitling the widow of the deceased to dower in the premises. It is held, also, in that State, that where an executory contract of the husband for the purchase of land is specifically enforced, after his death, his widow thereby becomes dowable of the land. This point was determined in Reed and others *v.* Whitney,[2] which was an action brought by the widow, children, and administrator of one Reed, then deceased, to compel the specific performance of a written contract to convey land to the deceased. It was alleged that the deceased and the defendant, pursuant to an agreement in writing between them, purchased the land on joint account, and had the conveyance made to the defendant alone; that the deceased had paid one-half the purchase money and expenses, and at his death was entitled to a conveyance from the defendant for an undivided half of the premises. The widow claimed dower in the land, and the administrator represented that it was needed for the payment of debts. After disposing of other questions arising in the case, the court proceeded to the consideration of the claim of the widow for dower. "An interesting question," they said, "remains to be considered. The widow of the deceased is a plaintiff in this action, and claims an interest in the premises to be

[1] Hale *v.* Munn, 4 Gray, 182.

[2] Reed *v.* Whitney, 7 Gray, 533.

conveyed by the defendant under a decree of the court, by virtue of her right of dower in her husband's estate. By the common law, it is perfectly well settled that a widow is dowable only of those estates of which her husband had the legal seizin, and that she is not entitled to dower in estates of which he was only equitably seized, or to the beneficial interest of which he was entitled as *cestui que trust*. . . . Under our statutes relating to dower, Rev. Sts. c. 60, the wife is entitled to dower only as at common law in estates of which the husband was seized; with the addition of a right to dower in equities of redemption of mortgaged estates, by § 2, and in certain leasehold estates, by § 18. Strictly speaking, therefore, by the rules of law, the wife of the deceased is not entitled to dower, as such, in the premises which her husband agreed to purchase. But we think her claim can be well supported on another ground. By the Rev. Sts. c. 74, §§ 8–14,[1] which relate to the specific performance of contracts in writing to convey real estate, where the party bound to make the conveyance is dead, it is provided that if the person to whom the conveyance is to be made shall also die before such conveyance is made, any person who would have been entitled to the estate under him, 'as heir, devisee, or otherwise, in case the conveyance had been made according to the terms of the contract,' may commence a suit in equity for the specific performance of the contract, 'and the conveyance shall thereupon be so made as to vest the estate in the same persons who would have been so entitled to it.' The clear intent of this statute was to place the power of the court, in enforcing such contract, upon the broadest principles of equity, so that the benignant rule of treating as done that which, for a valid consideration, the parties had agreed to do, should be most liberally applied, without regard to any technical rule of law which might otherwise operate to restrain it. We can not doubt that the right of the wife to dower in lands agreed to be purchased by the husband is within the letter as well as the spirit of the statute. If the conveyance had been made by the defendant in the lifetime of Reed, so as to vest the legal seizin of the estate in him according to the contract, the wife would clearly have been one of the persons entitled to an estate under him in the lands described in the contract, within the broad terms used in the statute, 'as heir, devisee, or otherwise,' and to whom the conveyance would have to be made under the order of court, 'so as to vest the

[1] Rev. Stat. Mass. 1836, p. 473; Gen. Stat. Mass. (1860,) p. 575, §§ 5, 6.

estate in the same persons who would have been so entitled to it.' There is no reason why the rights of the widow of the party to whom the conveyance is to be made, should not be the same where the other party is still living, as where specific performance of the contract is sought to be enforced against his representatives. The intention of the legislature, in case of the death of the obligor before a conveyance, to put the rights of all persons claiming under the obligee upon the same footing as if the conveyance had been made in his lifetime, is so clearly expressed in this chapter, *that it must be deemed to repeal by implication, to this extent*, the technical rule of law that the widow is not entitled to dower in an equitable estate. We are the more inclined to adopt this view, because the rule itself, as already stated, has no just foundation in principle, but rests exclusively upon authority. We are, therefore, of opinion that the widow of Reed is rightly made one of the plaintiffs in this action, and entitled to ask that the decree may be so shaped as to secure to her a right to be endowed in the premises which the defendant is bound to convey."

6. The doctrine of this case, which does not appear to have been questioned in subsequent decisions, works a radical change in the law respecting the rights of the dowress, as previously understood in Massachusetts. Its effect is to so far abrogate the common law rule as to give dower in equitable estates acquired under contracts of purchase, in all cases where the equity is rendered perfect and complete by full performance on the part of the purchaser so as to entitle him to call for a conveyance of the legal title. The statute referred to by the court and upon which they predicate their decision, appears to contemplate a specific performance even where the purchase money is not all paid at the death of the purchaser.[1] But in Lobdell *v.* Hayes,[2] it was determined that dower does not attach upon land held by the husband at the time of his death under an executory contract of purchase, unless he has fully complied with the terms of the contract in his lifetime. "We think the doctrine of Reed *v.* Whitney," the court observed, "has no application to a mere executory contract for the purchase of land, not executed at the death of the contracting party, and to the completion of which the widow was not bound. Such a case is not within the language or intent of the statute." And it was further held that no additional right is conferred upon the widow by the fact that after the death of

[1] § 17. [2] Lobdell *v.* Hayes, 4 Allen, 187.

the husband the balance of the purchase money is paid by his administrators, and the land conveyed by the vendor to a trustee named by them, for the benefit of the estate. "By the terms of the contract," the court added, "the land was to be conveyed to Mr. Lobdell, or his assigns. If he had completed the contract, he might have exercised the election so as to deprive his wife of any right of dower.[1] The time for making the election had not arrived when he died; and if the duty and the right to complete the contract, and make the further payments devolved upon his personal representatives, the election to whom the conveyance should be made would likewise vest in them." And it would seem that the principle upon which the court proceeded in Reed *v.* Whitney, can hardly be extended to equitable interests created under express trusts, and therefore, as to that species of equitable estate the rule of the common law is supposed to be still in force in Massachusetts.[2]

7. In *Maine*, the rule requiring a legal seizin was applied in the following case: The defendant bargained with one Clapp to erect two houses for the latter, and receive lands in payment. He afterwards agreed with the husband of the demandant by parol, that he (the husband) should build one of the houses for a specific price, and that the amount so agreed upon should be applied in payment for a part of the lands, which part was to be conveyed to him by the defendant. The lands were conveyed to the defendant by Clapp, and the defendant, in fulfillment of his agreement, designated a portion thereof by metes and bounds for the demandant's husband, into the possession of which he entered, and upon which he built a house, having paid for such portion in full, and where he continued to reside until his death. It was held that his widow was not entitled to dower. "A jury would not be authorized," the court observed, "to find that the husband was seized of any legal estate in the premises. And if

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[1] See post, §§ 45–49.

[2] Cases may arise, however, under express trusts, in which the equity of the wife would be quite as strong as in the case decided by the court. Take, for example, Banks *v.* Sutton, 2 P. Wms. 700, in which lands were devised in trust, with directions to the trustees to convey to the *cestui que trust* at the expiration of a limited time, and the latter died after the time limited without having received a conveyance. Sir Joseph Jekyll decreed dower to the widow of the *cestui que trust*, upon the principle that equity will consider that as done which ought to have been done, and though this decision was afterwards denied to be law, yet it is manifestly founded in justice, and may be regarded as forming the basis of the American doctrine of dower in equitable estates. See ch. 19, § 8 *et seq.*

the tenant should be considered as holding the estate in trust for the benefit of Eli, (the husband,) the demandant would not be entitled to dower. For the widow of the *cestui que trust* is not dowable of an estate in which the husband had an equitable but not a legal title."[1]

8. The following case was determined in *Michigan:* Prior to, and on July 1, 1796, A. possessed certain lands which he conveyed by warranty deed in 1798 to B., who took possession, and in 1800, by warranty deed in which his wife did not join, conveyed them to C., who took possession in the same year. In 1807 Congress passed "An act regulating the grant of lands in the territory of Michigan," which provided that the fee simple of any tract of land, settled, occupied, and improved prior to July 1, 1796, where the occupancy had been continued to the time of the passing of the act, should be granted to the person or persons in the actual possession and occupancy thereof; and commissioners were appointed to ascertain and decide on the rights of those claiming under the act. C. claimed the premises aforesaid, and a patent therefor was issued to him by the government. In an action brought by the widow of B. it was held that she was entitled to dower in the premises.[2]

9. In *South Carolina*, in a case where the husband entered upon lands under a written contract to receive the title on payment of the purchase money, and after payment was made, upon a bill for specific performance to which the creditors of the husband were parties, the premises were sold as his property for the payment of his debts, his widow, after his death, was held not entitled to dower, as he had never been invested with a legal seizin.[3]

10. In a case determined in *Georgia*, the husband bargained for land, took a bond for title to be made to him upon payment of the purchase money, went into possession, and died. His vendor administered upon his estate, and as administrator sold the land. It was decided that the widow of the deceased purchaser had no right of dower therein. "Did this incomplete equitable title," the court said, "amount to a seizin in him? It did not. For be the meaning of the word 'seizin' what it may, this much, at least, is certain; that the meaning includes in it this ingredient, viz., a title which is complete. . . . . If there is any statute in this State which changes the law of

[1] Hamlin *v.* Hamlin, 19 Maine, (1 App.) 141.

[2] May *v.* Specht, 1 Mann. 187.

[3] Secrest *v.* McKenna, 6 Rich. Eq. 72.

England in this respect, I am not aware of it. I think the statute aforesaid,[1] is not one which does."[2]

In what States dower may be had of equitable estates.

11. In Virginia,[3] Kentucky,[4] New York,[5] Pennsylvania,[6] New Jersey,[7] Ohio,[8] Illinois,[9] Rhode Island,[10] Indiana,[11] Alabama,[12], Mary-

[1] Prince's Dig. 249. This statute gives dower in the lands of which the husband died "seized and *possessed*."

[2] Bowen *v.* Collins, 15 Geo. 100.

[3] Stat. Va. 1785 and 1792; Tate's Dig. p. 175; Va. Code, 1849, p. 474, § 1; Rowton *v.* Rowton, 1 Hen. & M. 92; Claiborne *v.* Henderson, 3 Hen. & M. 322; Wheatley *v.* Calhoun, 12 Leigh. 264; Blair *v.* Thompson, 11 Gratt. 441.

[4] Rev. Stat. Ky. p. 393, art. 4, §§ 8, 13; Stanton's Rev. vol. ii. p. 22; Pugh *v.* Bell, 2 Mon. 126; Stevens *v.* Smith, 4 J. J. Marsh. 64; Dean *v.* Mitchell, Ibid. 451; Hamilton *v.* Hughes, 6 J. J. Marsh. 581; Lindsey *v.* Stevens, 5 Dana, 104; Brewer *v.* Van Arsdale, 6 Dana, 204; Oldham *v.* Sale, 1 B. Mon. 76; Robinson *v.* Miller, 1 B. Mon. 88, 91; Heed *v.* Ford, 16 B. Mon. 114; Gully *v.* Ray, 18 B. Mon. 107.

[5] 2 Rev. Stat. N. Y. 112, §§ 71, 72; Ibid. 374, §§ 68, 64; 2 Rev. Stat. 3d ed. pp. 163, 169; 2 Rev. Stat. 4th ed. (1852,) p. 149, § 1; 3 Rev. Stat. 5th ed. p. 200, §§ 84, 85; Johnson *v.* Thomas, 2 Paige, 377; Hawley *v.* James, 5 Paige, 318; Sherwood *v.* Vandenburgh, 2 Hill, 303; Church *v.* Church, 3 Sandf. Ch. 434.

[6] Shoemaker *v.* Walker, 2 Serg. & R. 554; Reed *v.* Morrison, 12 Serg. & R. 18; Kelly *v.* Mahan, 2 Yeates, 515; Jones *v.* Patterson, 12 Pa. St. 149, 154; Pritts *v.* Ritchey, 29 Pa. St. 71; Evans *v.* Evans, Ibid. 277; Dubs *v.* Dubs, 31 Pa. St. 149; and see Junk *v.* Canon, 34 Pa. St. 286.

[7] N. J. Rev. L. p. 397, Rev. Stat. 1847, p. 71, ch. 4, § 1; Elmer's Dig. 147, note; Nixon's Dig. p. 209, § 1; Yeo *v.* Mercereau, 3 Harr. 387.

[8] Swan's Stat. (1841,) p. 296, § 1; Swan's Stat. (1854,) p. 329, § 1; 1 Swan & Critchf. p. 516, § 1; Miller *v* Wilson, 15 Ohio, 108; Rands *v.* Kendall, Ibid. 671; Smiley *v.* Wright, 2 Ohio, 506; Derush *v.* Brown, 8 Ohio, 412; McDonald *v.* Aten, 1 Ohio St. 293.

[9] Rev. Stat. 1833, p 627; Rev. Stat. 1839, p. 698, § 49; Act of March 3, 1845, § 1; 1 Purple's Dig. p. 494, ch. 2, Dower; Rev. Stat. Ill. 1856, p. 496, ch. 34, § 1; Gale's Stat. 697; 1 Stat. Ill. (1858,) p. 151, § 1; Davenport *v.* Farrar, 1 Scam. 314; Sisk *v.* Smith, 1 Gilm. 503; Owen *v.* Robbins, 19 Ill. 549; Wooley *v.* Magie, 26 Ill. 526.

[10] Pub. Laws R. I. (1844,) p. 188, § 1; Rev. St. R. I. (1857,) ch. 202, § 1.

[11] Rev. Code, 1824, p. 157, § 1; Rev. Code, 1831, p. 209, § 12; Rev. Stat. 1843, ch. 28, §§ 80–84; McMahan *v.* Kimball, 8 Blackf. 1, 10; Smith *v.* Addleman, 5 Blackf. 406; Taylor *v.* McCrackin, 2 Blackf. 260, 262; Crane *v.* Palmer, 8 Blackf. 120; Malin *v.* Coult, 4 Ind. 535.

But now, by 1 Rev. Stat. 1852, p. 251, the widow takes a share of the real estate absolutely, instead of a mere life estate, as before. And this right extends to equitable as well as legal estates. Ibid.

[12] Laws of Ala. 247, § 9; Clay's Dig. 157, § 36; Code, 1852, § 1854; Shields *v.* Lyon, Minor, 278; Gillespie *v.* Somerville, 3 Stew. & Port. 447; Edmonson *v.* Montague, 14 Ala 370; Crabb *v.* Pratt, 15 Ala. 843; Parks *v.* Brooks, 16 Ala. 529.

land,[1] North Carolina,[2] Tennessee,[3] Iowa,[4] Mississippi, Missouri,[6] Kansas,[7] and the District of Columbia,[8] dower is allowed in equitable estates of inheritance.

12. *Virginia.*—Before the statute of 1785,[9] dower was not allowed in equitable estates in Virginia.[10] That act provided that "where any person to whose use, or in trust for whose benefit, another is, or shall be seized of lands, tenements or hereditaments, hath, or shall have such inheritance in the use or trust as that, if it had been a legal right, the husband or wife of such person would thereof have been entitled to curtesy or dower, such husband or wife shall have and hold, and may, by the remedy proper in similar cases, recover curtesy or dower of such lands, tenements or hereditaments." We have seen, that with respect to uses or express trusts embraced by the provisions of this act, the doctrine of the common law was undoubtedly changed thereby;[11] but it very soon became an important question whether it was intended by the makers of the act to confer the right of dower in equitable estates acquired by executory contracts of purchase, and not resulting from a use or trust expressly declared by deed. The right of the wife to dower in such a case came before the Appellate Court of Virginia in Rowton *v.* Rowton,[12] and although a majority of the court decided against the wife, two out of the five judges were for giving judgment in her favor, and the decision of the

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[1] Dorsey's Laws, vol. i. p. 701, § 10; Act of 1818, ch. 193; 1 Md. Code, (1860,) p. 325, § 5; Hopkins *v.* Frey, 2 Gill, 359; Miller *v.* Stump, 3 Gill, 304; Spangler *v.* Stanler, 1 Md. Ch. Decis. 36; Bowie *v.* Berry, 1 Md. Ch Decis. 452; Bowie *v.* Berry, 3 Md. Ch. Decis. 359; Purdy *v.* Purdy, 3 Md. Ch. Decis. 547; Steuart *v* Beard, 4 Md. Ch. Dec. 319.

[2] 1 Rev. Stat. N. C. p. 614, § 6; N. C. Code, (1854,) p. 602, ch. 118, § 6; Thompson *v.* Thompson, 1 Jones' N. C. Law R. 430; Klutts *v.* Klutts, 5 Jones' N. C. Eq. R. 80.

[3] Stat. Laws Tenn. 1836, p. 265; Act of 1823, ch. 37; Code of Tenn. (1858,) p. 473, § 2398.

[4] Revision of 1860, p. 420, § 2477.

[5] Rev. Code Missis. (1824,) p. 282, § 7; Hutchinson's Missis. Code, p. 622, § 7; Howard & Hutch. Dig. p. 858, § 47; Rev. Code Missis. (1857,) p. 468, art. 167; Huckler *v.* Cobel, Walker, 91; Fleeson *v.* Nicholson, Ibid. 247; Torrence *v.* Snider, 27 Missis. 697. See James *v.* Rowan, 6 S. & M. 393.

[6] Stat. Misso. (1835,) p. 228, § 1; Revision of 1845, p. 430, § 1.

[7] Stat. Kansas Ter. (1855,) p. 314, § 1; Comp. Laws Kansas, (1862,) p. 478, § 1.

[8] Rev. Code D. C. (1857,) p. 199, § 2.

[9] Va. Laws, 1785, ch. 62; 12 Hen. Stat. at Large, 157, 158.

[10] Rowton *v.* Rowton, 1 Hen. & M. 92; Claiborne *v.* Henderson, 3 Hen. & M. 322.

[11] Ante, ch. 19, § 21.

[12] Rowton *v.* Rowton, 1 Hen. & M. 92.

others went, not upon the idea of dower not being allowed in equitable estates, but upon the conclusion to which they arrived, that the equitable estate of which dower was there claimed, was not satisfactorily established by the testimony in the case. And in Claiborne *v.* Henderson,[1] which afterwards came before the same court, Judge Roane, who was one of the judges that decided against the claim of dower in the former case, in remarking upon that case, after stating its circumstances, says: "The transaction having happened subsequent to the act of 1785, the widow claimed her dower *only* under the provision of that statute. Three of the judges overruled her claim, but it was on the ground of no contract having been proved on the father, as they thought, for more than a life estate in favor of the son. Two other judges thought that the son had an equitable estate in fee on the testimony, and on that ground were in favor of the dower under the act of 1785." In the course of his remarks, he further says: "The counsel in opposition to the claim of the wife . . . . admitted that under the act of 1785 the widow was entitled to dower, provided it should appear that her husband had such an equity in a fee simple estate as would authorize a court of equity to decree the legal estate." Upon this point, therefore, the bench and bar of the State appear to have concurred in opinion very soon after the question was mooted, and the doctrine thus recognized is now the settled law of that State.[2]

18. *Kentucky.*—The Virginia act referred to in the preceding section was passed before the separation of Kentucky from that State, and was afterwards re-enacted by the legislature of Kentucky.[3] And although for a time the proper construction of the act was regarded as a grave question, it was ultimately determined, in accordance with the doctrine of the Virginia courts, that equitable estates resulting from executory contracts of purchase, are subject to dower. In Winn *v.* Elliott,[4] the first reported case in which the subject was noticed, the court left the question undecided. In Herron *v.* Williamson,[5] dower was claimed of lands which the husband had purchased by verbal contract, and after making improvements thereon had transferred to a third person, to whom the legal title was conveyed. The

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[1] Claiborne *v.* Henderson, 3 Hen. & M. 322.

[2] See authorities cited ante, p. 402, note 3.

[3] 1 Dig. Laws Ky. 315, § 14, (1796.)

[4] Winn *v.* Elliott, Hardin, 482.

[5] Herron *v.* Williamson, Litt. Sel. Cas. 250, (1821.)

court disallowed the claim. "Whether, where the husband has a bond, or other written contract for the conveyance of land," they said, "he would be possessed of such an use or trust as would entitle the wife to dower under the act referred to, is a question of some difficulty, and which has never been settled in this country; nor do we conceive that it is necessary now to be decided; for, be that as it may, it is obvious that the husband of the complainant could not have had such an use or trust in the lot in controversy. His contract for the lot having been merely verbal, could have given him no right which, under the statute against frauds and perjuries, could have been enforced, either in a court of law or equity, and it would be absurd to suppose that the legislature contemplated giving the wife a right of dower in land to which the husband never had a right which could be enforced." In Pugh *v.* Bell,[1] dower was recognized as existing where the equity is complete, but was refused in that case because full payment of the purchase money had not been made. And in Hawkins *v.* Page,[2] the point was discussed, but not decided by the court.

14. In Bailey *v.* Duncan,[3] however, the question was fairly raised and authoritatively determined. In that case the husband died possessed of lands to which he was entitled to a conveyance of the legal estate from the vendor. "If we advert, as we should do," the court remarked, "to the old law as it stood at the passage of the act, the mischief which must have actuated the legislature in making the change, and the remedy which the act has provided, we apprehend but little doubt will be entertained as to the propriety of giving such a construction to the act as will embrace all trusts, whether expressly declared by deed, or resulting from executory contracts by construction of courts of equity. The interest of the *cestui que trust* is precisely the same, let the trust be created in the one way or the other; the justice of the wife's claim is as strong in one case as the other; and, as she was not dowable in a trust of either sort, before the enactment of the statute, the mischief to be remedied by the act emphatically demands that the wife should be endowed of trust estates of both sorts." And in accordance with these views the prayer of the demandant was granted. The doctrine of this case was followed in

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[1] Pugh *v.* Bell, 2 Mon. 126, (1825.)
[2] Hawkins *v.* Page, 4 Mon. 136, (1827.)
[3] Bailey *v.* Duncan, 4 Mon. 256, (1827.)

numerous decisions subsequently made in the courts of Kentucky,[1] and the right to dower in equitable estates acquired by executory contract is now secured by express statute.[2]

15. *New York.*—Previous to the adoption of the revised statutes of New York, the rule of the common law prevailed in that State, and the wife was held not entitled to dower in lands in which the husband had a mere equitable estate. The endowment of the wife of a mortgagor, subject to the right of the mortgagee, was not regarded as an exception to this rule, because in that State the mortgagor is treated as the legal owner of the land, and the mortgagee as having a mere lien thereon for the payment of his debt. This being the case, the right of the widow to dower in the equity of redemption was looked upon as a legal and not merely as an equitable right.[3] But the legislature, in the revision of the statutes, distinctly adopted the principle of permitting the widow to receive equitable dower in the descendible equitable interests of the husband in real estate which belonged to him at the time of his death. In the case of a contract for the purchase of land, where the husband dies seized of an inheritable interest in the premises, before a conveyance of the legal estate has been executed, the right of the widow to equitable dower therein, subject to the lien of the vendor for the unpaid purchase money, is distinctly recognized and declared by the legislature, in that part of the revised statutes which authorizes a sale of the decedent's interest in the premises under a surrogate's order for the payment of debts.[4] So in the case of lands purchased under execution, if the purchaser die during the fifteen months allowed for redemption, or before the actual conveyance of the land by the sheriff, the statute directs the conveyance to be made to the executors or administrators of the decedent, in trust for his heirs at law, but subject to the dower of his widow, if there be one.[5] These provisions are favorably regarded by the courts, and the widows of

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[1] Stevens *v.* Smith, 4 J. J. Marsh. 64; Dean *v.* Mitchell, Ibid. 451; Hamilton *v.* Hughes, 6 J. J. Marsh. 581; Lindsey *v.* Stevens, 5 Dana, 104; Brewer *v.* Van Arsdale, 6 Dana, 204; Lawson *v.* Morton, Ibid. 471; Robinson *v.* Miller, 1 B. Mon. 88, 91; Heed *v.* Ford, 16 B. Mon. 114; Gully *v.* Ray, 18 B. Mon. 107.

[2] Rev. St. Ky. p. 393, art. 4, §§ 8, 13; 2 Stanton's Rev. p. 27, § 13.

[3] Collins *v.* Torry, 7 John. 278; Hawley *v.* James, 5 Paige, 452; Johnson *v.* Thomas, 2 Paige, 377.

[4] 2 R. S. 112, §§ 71, 72; 3 Rev. Stat. 5th ed. p. 199, §§ 78–85.

[5] 2 R. S. 374, §§ 63, 64.

those who have died since the revised statutes went into effect, are allowed their equitable dower in the inheritable interests of their husbands, in all cases where it can be done without interfering with the rights of others.[1]

16. In the case last cited, the following, among other questions, was decided by the court: Lands belonging to several tenants in common were divided into lots for the purpose of sale, and the several owners, with their wives, joined in a conveyance of the lands to a trustee for the purpose of enabling him to give conveyances with more facility to such persons as might, from time to time, contract for the purchase of the lots. One of the owners afterwards died. At the time of his death a part of the lands had been sold and a part remained unsold. His widow was held entitled to equitable dower in his undivided interest in such of the lots as were not sold at the time of his death, but not in lots which had been sold by the trustee, although they had not been conveyed in the lifetime of the husband. "There was no legal objection to the creation of such a trust," the chancellor said, "previous to the adoption of the revised statutes. And I do not at present discover any legal objection to such a conveyance as a mere power in trust, even if the trust deed had been executed since the revised statutes went into operation. See 1 R. S. 729, § 58. In the latter case, however, the legal estate would remain in the grantors until the execution of the power, and the widow would take her dower in the land, subject to be divested by the execution of the power, in favor of a purchaser by contract from the grantors, or their heirs or devisees. I do not consider it important to inquire whether the legal estate in the premises remained in Burnet and Hawley at the death of the testator, coupled with the power in trust, or was vested in the grantors, subject to be divested by the execution of the trust power, by the operation of the 47th section of the article of the revised statutes relative to uses and trusts.[2] For, in either case, the widow's equitable right to dower in such portions of the premises, or the proceeds thereof, as had not been contracted to be sold, would still be the same. The object of the parties to this trust deed was not to deprive the wives of the grantors of their equitable right to dower in such portions of the estate as should remain unsold at the deaths of their respective husbands. But the real object of the grantors undoubt-

[1] Hawley v. James, 5 Paige, 318, 453.

[2] 1 R. S. 727, §§ 47, 48.

edly was, to place the legal estate in such a situation that the premises might be subdivided into lots, and sold for their joint benefit, not only during their joint lives, but afterwards; and that perfect titles might be made to the purchasers without the trouble and expense of obtaining a separate and distinct conveyance to each purchaser from the grantors, or their heirs or assigns, and from their several wives or widows. The purchasers, therefore, under the joint contracts of the several persons beneficially interested in the trust estate, from time to time, whether such contracts are made by such persons for themselves, or through the instrumentality of an agent or attorney, will, by the conveyances under the power in trust contained in the deed to Burnet and Hawley, obtain a perfect title to their respective lots, free from any claim of dower therein. . . . . The interest of the testator in the lands contracted to be sold, therefore, was not an estate of inheritance descendible to his heirs, and the widow has no equitable right of dower in that part of the premises. But the executors may claim a specific performance of the contract, and an execution of the conveyances under the trust power for the benefit of those who are entitled to share in the testator's personal estate. As to the residue of the trust premises in which the husband had an inheritable interest at the time of his death, the widow is equitably entitled to one-third of the five-eighths of the net income thereof during her life, as and for her dower. And if the premises shall hereafter be sold, and conveyed to the purchasers under the power contained in the trust deed, she will be entitled to the same portion of the interest of the purchase money, and for the same time, or to a gross sum in lieu thereof."[1]

17. Upon the same principle, where lands were sold under a decree of court, and the purchaser entered into possession, but died before receiving a deed or paying the whole of the purchase money, it was held that his widow was entitled to dower in the lands, subject to the payment of the residue of the purchase money.[2]

18. *Pennsylvania.*—The dower law of Pennsylvania, in some of its material features, is peculiar to that State. "An act relating to the descent and distribution of the estates of intestates," substantially re-enacting provisions of the statutes of 4th April, 1794, and

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[1] Hawley *v.* James, 5 Paige, 318, 455. See, also, Warner *v.* Van Alstyne, 3 Paige, 513.

[2] Church *v.* Church, 3 Sandf. Ch. 434. See Sherwood *v.* Vandenburgh, 2 Hill, 303.

1794, was passed April 8th, 1833, and is still in force.[1] it is declared that the estate of a decedent, whether ale, remaining after payment of all just debts and legal which shall not have been sold, or disposed of by will, or wise limited by marriage settlement, shall be divided and en- ed as follows: 1. Where the intestate leaves a widow *and issue*, the widow shall be entitled to *one-third* part of the real estate for life, and to one-third part of the personalty absolutely. 2. Where the intestate leaves a widow and collateral heirs, or other kindred, but no issue, the widow shall be entitled to *one-half* part of the real estate, including the mansion house and buildings appurtenant thereto, for life, and to one-half the personal estate absolutely.[2] In default of heirs or kindred, the surviving husband or wife takes the estate, whether real or personal, absolutely.[3] And it is further provided that "the shares of the estate directed by this act to be allotted to the widow, shall be in lieu, and full satisfaction of her dower at common law."[4]

19. This act, it will be perceived, relates only to the estate the husband may have at the time of his death.[5] It is limited, also, to such portion of his property as is not consumed in the payment of debts and charges, and not disposed of by will. Therefore, where the husband has disposed of his property in his lifetime; or where he disposes of it by will; or where his estate is insolvent, his widow takes nothing under the provisions of the act above quoted. But in such proportion of the estate as is not consumed in the payment of debts or charges, remaining undisposed of by the husband, she takes the share provided by statute. This allotment is called her *statutory* dower, by way of distinguishing it from the dower interest which she takes under the principles of the common law, as will presently be explained. In Bachman *v.* Chrisman,[6] it is said that the interest which the widow takes under this statute in the real estate of her deceased husband "does not come within the ordinary definition of dower, because that refers to the common law provision for widows.

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[1] Pamphlet Laws, 315; Duplop, 500; Purdon's Dig. 549.

[2] § 1, art. 1, 2. [3] § 10.

[4] § 15; Cord, Mar. Wom. 672; Shaupe *v.* Shaupe, 12 S. & R. 12.

[5] Riddlesberger *v.* Mentzer, 7 Watts, 141; Leinaweaver *v.* Stoever, 1 Watts & Serg. 160; Borland *v.* Nichols, 12 Pa. St. (2 Jones,) 42; and see Pritts *v.* Ritchey, 29 Pa. St. (5 Casey,) 71, 76.

[6] Bachman *v.* Chrisman, 23 Pa. St. (11 Harris,) 162.

But it is a statutory substitute for that provision, and may very well be called statutory dower. Like dower at common law, it is a defined interest in her late husband's lands, arising at his death, and is a freehold estate." In Kurtz's Appeal,[1] it was treated as a *lien* upon land, rather than an interest therein, but subsequent decisions have qualified the doctrine of that case.[2]

20. But the courts of Pennsylvania have not left the widow to the uncertain and precarious provision contemplated by the above statute. That enactment being limited to the estate which the husband held at his death, and in respect of which he died intestate, the courts have determined that as to lands which were aliened by him during the coverture without the concurrence of the wife, or which he attempts to dispose of by will to her prejudice, she may take her dower as at common law.[3] This doctrine is the result of judicial construction, solely, and appears to be unsupported by any express law upon the subject. It is now too well established, however, by an unbroken current of authority, to admit of serious question or doubt.

21. While adopting the rule of the common law to the extent just stated, as a part of the law of Pennsylvania, the courts have gone one step further in behalf of the widow. They have so far modified that rule as to give dower in equitable as well as legal estates. In Kelly *v.* Mahan,[4] it was held that dower may be had of a mere improvement claim, and in Shoemaker *v.* Walker,[5] the right of dower in equitable estates was expressly determined. "In Pennsylvania," said Tilghman, Chief Justice, after remarking upon the doctrine of the common law, "the usage has been more reasonable, and more analogous to the general principles of dower. The husband and

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[1] Kurtz's Appeal, 2 Casey, 465.

[2] Schall's Appeal, 40 Pa. St. (4 Wright,) 170. See, also, Zeigler's Appeal, 35 Pa. St. 173.

For a further consideration of the subject of statutory dower, the reader is referred to the following authorities: Shaupe *v.* Shaupe, 12 S. & R. 12; Thomas *v.* Simpson, 3 Barr, 60, 70; Pringle *v.* Gaw, 5 S. & R. 536; Power *v.* Power, 7 Watts, 205, 212; Bishop's Appeal, 7 W. & S. 251; Bratton *v.* Mitchell, 7 Watts, 113; Borland *v.* Nichols, 2 Jones, 38. See, also, post, ch. 29, §§ 36–40.

[3] Borland *v.* Nichols, 12 Pa. St. (2 Jones,) 42; Leinaweaver *v.* Stoever, 1 W. & S. 160; Hinnershits *v.* Bernhard, 13 Pa. St. (1 Harris,) 518; Covert *v.* Hertzog, 4 Barr, 145; Pritts *v.* Ritchey, 29 Pa. St. (5 Casey,) 71, 76. See post, ch. 29, §§ 36–40.

[4] Kelly *v.* Mahan, 2 Yeates, 515.

[5] Shoemaker *v.* Walker, 2 S. & R. 554.

wife are placed on an equal footing. He has his tenancy by the curtesy, and she has her dower. I do not know that the question has ever been brought to a decision in this court. The reason of this I take to be that it has never been doubted. I have frequently heard it taken for granted, but never seriously questioned." This doctrine has since been adhered to in Pennsylvania, and is regarded as the settled law of that State.[1]

22. *New Jersey.*—In this State, as we have already seen,[2] the courts, at first, were disposed to give such construction to their statute as would exclude dower from equitable estates.[3] Subsequently, however, a different construction prevailed, and it is now settled that such estates are subject to dower.[4]

23. *Ohio.*—In Ohio the wife has dower in all lands of which the husband was seized of an estate of inheritance at any time during the coverture, and also "of one-third part of all the right, title or interest that her husband, at the time of his decease, had in any lands and tenements, held by bond, article, lease, or other evidence of claim."[5]

24. Under this statute it is held that the husband must have either the legal title to, or an actual subsisting equitable interest in lands, to give the right of dower. And therefore, where lands were purchased and paid for by the husband during the coverture, and for the purpose of defrauding his creditors he procured the conveyance to be made to his children, and after his death the lands were subjected to sale by creditors to satisfy their claims, it was held that his widow could not be endowed. The deed, the court maintained, although void as to creditors, was good, not only as to the purchaser, but also as to his wife, and so far as they were concerned, vested the children to whom it was made, with both the legal and the equitable estate.[6] But where it is apparent that the right of dower in an equitable interest exists, the court will see that it is fully protected,

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[1] Reed *v.* Morrison, 12 Serg. & R. 18; Jones *v.* Patterson, 12 Pa. St. (2 Jones,) 149, 154; Pritts *v.* Ritchey, 29 Pa. St. (5 Casey,) 71; Dubs *v.* Dubs, 31 Pa. St. (7 Casey,) 149: Evans *v.* Evans, 29 Pa. St. 277. And see Junk *v.* Canon, 34 Pa. St. (10 Casey,) 286.

[2] Ante, ch. 19, § 22.

[3] Montgomery *v.* Bruere, 1 South. 260.

[4] Montgomery *v.* Bruere, 2 South. 865; Yeo *v.* Mercereau, 3 Harr. 387; Woodhull *v.* Reid, 1 Harr. 128; Boyd *v.* Thompson, 1 Zab. 58, 61; S. C. 2 Zab. 543, 548.

[5] 1 Swan & Critchf. Stat. p. 516, § 1. See ante, p. 402, note 8.

[6] Miller *v.* Wilson, 15 Ohio, 108, 116.

even though the widow be not represented in the proceeding, and no answer is filed in her behalf. Thus, where creditors of the husband, after his death, instituted proceedings to compel satisfaction of their demands by a sale of his equitable interest in certain real estate, and the Court of Common Pleas ordered a sale accordingly, without taking any notice of the dower interest of the widow, the Supreme Court, although her rights were not asserted in the case, nevertheless so far modified the decree as to require the sale to be made subject thereto.[1]

25. *Illinois.*—By the statute of Illinois equitable estates are subject to dower, and this provision embraces all real estate of every description contracted for by the husband in his lifetime, the title to which may be completed after his decease.[2] It is held, however, that this statute refers to equitable estates of *inheritance*, only, and therefore that a mere pre-emption right to purchase lands is not an estate of which a widow can be endowed.[3] "It is a right," the court said, "to purchase at a fixed price within a limited time, in preference to others. If he is either unable, or unwilling to purchase at the price, or by the time mentioned in the law, the land can be sold to others, and the pre-emptioner turned out of possession as an intruder. These conditions annexed to his possession, clearly show that his interest is only temporary, and may never ripen into an estate of inheritance. While, therefore, the pre-emptioner remains in possession, his estate can not be considered of a higher nature than an estate for years, and consequently the widow can not be endowed of it."

26. *Rhode Island.*—In Rhode Island the widow is dowable "of all the lands, tenements and hereditaments whereof her husband, or any other to his use, was seized of an estate of inheritance at any time during the intermarriage, to which she shall not have relinquished her right of dower by deed," except where she is barred under the provisions of the same act relating to jointure and devises in lieu of dower.[4]

27. *Indiana.*—The Indiana Revised Code of 1824 provided that the widow of any person dying intestate or otherwise, should "be

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[1] McDonald *v.* Aten, 1 Ohio St. 293.

[2] See ante, p. 402, note 9.

[3] Davenport *v.* Farrar, 1 Scam. 314. See Sisk *v.* Smith, 1 Gilm. 503; Owen *v.* Robbins, 19 Ill. 545; Wooley *v.* Magie, 26 Ill. 526.

[4] Public Laws R. I. (1844,) p. 188, § 1; Rev. Stat. R. I. (1857,) p. 503, § 1.

endowed of one full and equal third part of all the lands, tenements and hereditaments, either legal or equitable, whereof her husband or any other person to his use was seized at any time during the coverture."[1] This provision was retained in the Revised Code of 1831, and also in the Revised Statutes of 1843,[2] and on several occasions was recognized by the courts as clearly conferring dower in equitable estates of inheritance arising upon contracts of purchase.[3] By the present statute the widow receives an absolute estate in a proportion of her husband's lands instead of a mere life estate as before, and this right embraces the equitable as well as the legal interests of which the husband was possessed.[4]

28. *Alabama.*—Under the statute of Alabama, dower is given in all estates of inheritance held in trust for the husband.[5] This statute is sufficiently broad to confer upon the wife an inchoate right of dower in land purchased by the husband from the Indian reserve under the Creek treaty of 1832, as soon as the contract is approved by the President of the United States.[6] So a certificate of the board of commissioners, confirming a husband's claim to land under a Spanish warrant of survey, is sufficient evidence of his title to entitle his widow to dower, although no patent has been taken out.[7] Nor is her interest affected or impaired by the fact that the estate of her husband is represented insolvent.[8]

29. *Maryland.*—In this State, also, by the statute of 1818, dower is allowed in the equitable interests of the husband.[9] But where a *lease* was executed to the husband containing covenants on the part of the lessor to convey the fee simple to the former when requested so to do, it was held that the estate which passed thereby was a legal and not an equitable estate; that the instrument could not be made to operate as a conveyance by lease and release at common law, and

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[1] Rev. Code, 1824, p. 157, § 1.

[2] Rev. Code, 1831, p. 209, § 12; Rev. Stat. 1843, p. 428, ch. 28, §§ 80–84.

[3] McMahan *v.* Kimball, 3 Blackf. 1; Smith *v.* Addleman, 5 Blackf. 406; Taylor *v.* McCrackin, 2 Blackf. 260; Crane *v.* Palmer, 8 Blackf. 120; Malin *v.* Coult, 4 Ind. 535.

[4] 1 Rev. Stat. 1852, p. 251.

[5] Clay's Dig. 157, § 36; Edmondson *v.* Montague, 14 Ala. 370; Crabb *v.* Pratt, 15 Ala. 843; Lewis *v.* Moorman, 7 Port. 522. See ante p. 402, note 12.

[6] Parks *v.* Brooks, 16 Ala. 529.

[7] Shields *v.* Lyon, Minor, 278.

[8] Allen *v.* Allen, 4 Ala. 556.

[9] See ante, p. 408, note 1.

consequently that the statute had no application, and the widow was not entitled to dower.[1]

30. *North Carolina.*—The North Carolina act of 1784[2] provided that the widow should be entitled to dower in "one-third part of all the lands and tenements of which her husband died seized or *possessed.*"[3] It was held that the rule of the common law requiring a seizin of the legal estate, was not changed by this phraseology. "I have considered this case," said the judge who delivered the opinion of the court in Kirby *v.* Dalton,[4] "as if the widow was entitled to dower in the husband's equities, which this court has more than once decided against." In 1828,[5] however, a change was introduced in the law by the following enactment:—

> When a man shall die seized of an equity of redemption, or other equitable or trust estate in fee, his wife shall be entitled to dower therein, subject to valid incumbrances thereon, in the same manner as she is entitled to be endowed of a legal estate of inheritance.[6]

This provision, with a slight change in the phraseology, is carried into the Revised Code of 1855.[7]

It has been held, however, even under the foregoing statute, that dower in equitable estates can not be recovered at *law*, but that the demandant must proceed in *equity*. Thus, in Thomas *v.* Thomas,[8] land had been conveyed to the husband by deed executed in due form, but not registered during his lifetime, and it was adjudged, therefore, that under the laws of that State the husband did not die seized, but had only an *incomplete* legal title.[9] The court added: "If a widow be entitled to dower in land to which the title of her husband was, at the time of his death, in that state, she can not recover it at law, because, being incomplete at law, she can not give legal evidence of his seizin. It may be that she may have relief in equity, as her husband would have had." It had been

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[1] Spangler *v.* Stanler, 1 Md. Ch. Decis. 36.

[2] See ante, ch. 2, § 15.

[3] Public Acts N. C. vol. i. p. 353, § 8; Laws of N. C. vol. i. p. 469, § 8; Rev. Stat. N. C. (1837,) vol. i. p. 612, § 1.

[4] Kirby *v.* Dalton, 1 Dev. Eq. 195, (1828); accord. Taylor *v.* Parsley, 3 Hawks, 125; Tipton *v.* Davis, 5 Hayw. (Tenn.) 278, (1818.) See post, § 31.

[5] Act of 1828, ch. 14. See Tyson *v.* Harrington, 6 Ired. Eq. 329, 332; Tyson *v.* Tyson, 2 Ired. Eq. 137.

[6] 1 Rev. Stat. N. C. (1837,) p. 614, § 6.

[7] Rev. Code N. C. (1855,) p. 602, § 6.

[8] Thomas *v.* Thomas, 10 Ired. Law R. 123.

[9] See ante, ch. 12, § 23.

previously settled that an unregistered deed vested in the bargainee an inchoate legal estate, and that if such deed were destroyed before registration, or its registration prevented by any undue means, the bargainee, or those succeeding to his rights, might have relief in equity.[1] Tyson *v.* Tyson[2] and Tyson *v.* Harrington[3] were cases of this character, and in both of them, upon proceedings in chancery, dower was allowed to the widow. In the recent case of Thompson *v.* Thompson,[4] however, the strict rule applied in Thomas *v.* Thomas appears to have been departed from, for in that case dower was allowed at law in an equitable estate acquired under an executory contract of purchase, although the purchase money had not been fully paid. In Klutts *v.* Klutts,[5] which was a case in equity, the husband bid off land at the sale of a clerk and master in equity, and gave his bond for the purchase money, but died before the sale was confirmed, or the purchase money paid. The sale being afterwards confirmed, and the purchase money paid from the personal estate, the widow was held dowable of the land.[6]

31. *Tennessee.*—The North Carolina act of 1784[7] was re-enacted in Tennessee, and continued in force for a number of years after the organization of the latter under a separate government.[8] And before the amendment of 1823, the same construction was given the act, holding that it did not embrace equitable estates, that had been adopted in North Carolina. "It is urged," said the court in Tipton *v.* Davis,[9] "that the term 'possessed' extends to estates of which the owner can not be legally said to be seized. This idea, it is said, comprehends all interests not yet grown into perfect legal titles by grant, though in progression towards that completion. Will it extend, then, to leaseholds? No; there is not an estate for life of which the widow can be seized for and during the term of her life. Construction ever since 1784 has determined the contrary. The

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[1] Price *v.* Sykes, 1 Hawks, 87; Tolar *v.* Tolar, 1 Dev. Eq. 456; Morris *v.* Ford, 2 Dev. Eq. 412; Tate *v.* Tate, 1 Dev. & Bat. Eq. 22.

[2] Tyson *v.* Tyson, 2 Ired. Eq. 137.

[3] Tyson *v.* Harrington, 6 Ired. Eq. 329.

[4] Thompson *v.* Thompson, 1 Jones' N. C. Law R. 430, (1854.)

[5] Klutts *v.* Klutts, 5 Jones' N. C. Eq. 80.

[6] See, also, Campbell *v.* Murphy, 2 Jones' N. C. Eq. 357.

[7] See ante, ch. 2, § 15.

[8] 1 Laws of Tenn. (1821,) p. 292, § 8; 1 Laws of Tenn. (1831,) p. 77, § 8; Stat. Laws Tenn. (1836,) by Caruth. & Nich. p. 262, § 8.

[9] Tipton *v.* Davis, 5 Hayw. (Tenn.) 278, (1818.)

term 'possessed' is not to indicate the quantum of estate, but the manner of occupation; and signifies, though not actually seized by inhabitancy, yet if he is so entitled by deed and a legal estate as to have a legal right to the possession, then she shall be endowed."[1] The act of 1823, however, gave dower in equitable estates in the following terms:—

> Widows shall be entitled to dower out of equitable estates in land of which their husbands were the owners at the time of their death, in the same manner that they are entitled to dower in the legal estates of which their husbands may have died seized or possessed.[2]

The present statute is as follows:—

> If any person die intestate leaving a widow, she shall be entitled to dower in one-third part of all the lands of which her husband died seized and possessed, or of which he was equitable owner.[3]

32. *Iowa.*—So long as the provisions of the ordinance of 1787 were in force in Iowa, dower was not allowed in equitable estates.[4] The Code of 1851 gave to the widow *absolutely*, one-third in value of all the real estate in which the husband, at any time during the marriage, had a legal or equitable interest which had not been sold on execution or other judicial sale, and to which she had made no relinquishment of her right.[5] But this was changed by an act passed January 24, 1853, which gave to the widow as her *dower* "one-third in value of all the real estate in which the husband, at any time during the marriage, had a legal or equitable interest," to which she had not relinquished her right.[6] This provision is still in force.[7]

33. *Mississippi.*—The Virginia act of 1785,[8] making the estate of a *cestui que trust* subject to dower, was adopted in Mississippi in

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[1] 3 Hayw. 62, 67, 68, is to the same effect.

[2] Act of 1823, ch. 37; Laws of Tenn. (1831,) vol. i. p. 77, § 4; Stat. Laws Tenn. (1836,) by Caruth. & Nich. p. 265, § 4. See, also, Thompson *v.* Cochran, 7 Humph. 72; Lewis *v.* James, 8 Humph. 587.

[3] Code Tenn. (1858,) p. 473, § 2898.

[4] See Davis *v.* O'Ferrall, 4 Greene, 168; O'Ferrall *v.* Simplot, 4 Clarke, 381; Pense *v.* Hixon, 8 Clarke, 402; ante, ch. 2, § 36.

[5] Code of Iowa, (1851,) § 1394.

[6] Act of January 24, 1853; took effect July 1, 1853; Laws Fourth Gen. Assembly, ch. 61, p. 97.

[7] Revision of 1860, § 2477. See Barnes *v.* Gay, 7 Clarke, 26; Burke *v.* Barron, 8 Clarke, 132.

[8] Ante, § 12; ch. 19, § 21.

1812,[1] and has continued in force ever since.[2] The present statute contains a further provision expressly giving dower in lands held under contract of purchase, notwithstanding full payment of the purchase money has not been made. But in such case the widow must contribute her proportion of the unpaid purchase money, or take her dower according to the value of the interest held by her husband in the lands at the time of his death.[3]

34. *Missouri.*—By the Missouri statute it is provided that "every widow shall be endowed of the third part of all the lands whereof her husband, or any other person *to his use*, was seized of an estate of inheritance at any time during the marriage to which she shall not have relinquished her dower in the manner prescribed by law."[4]

35. *Kansas.*—The foregoing provision of the Missouri act is copied without modification into the dower act of Kansas, and is still in force in that State.[5]

36. *District of Columbia.*—By the Revised Code of the District of Columbia it is enacted that "when any person to whose use, or in trust for whose benefit, another is seized of lands, hath such inheritance in the use or trust, as would, were it a legal right, entitle his widow to dower, such widow shall have dower therein, and may, by the remedy proper in similar cases, recover the same."[6] Prior to the passage of this statute it was decided that the rule of the common law excluding dower from equitable estates, was in force in that part of the District of Columbia which had been formed from Maryland.[7]

Whether the equity must be complete in order to give dower.

37. The statutes conferring dower in equitable interests are not uniform in the several States. In some of them it is required that the equity of the husband shall be perfect and complete, so as to entitle him to a conveyance of the legal title. In others a less strin-

[1] Act of Dec. 12, 1812, Stat. p. 84; Digest Stat. Missis. Ter. (1816,) p. 82.

[2] Rev. Code Missis. (1824,) p. 232, § 7; Howard & Hutch. Stat. (1840,) p. 853, § 47; Hutch. Missis. Code, p. 622, § 7; Rev. Code Missis. (1857,) p. 468, art. 167.

[3] Rev. Code, (1857,) p. 468, art. 166. See Torrence *v.* Snider, 27 Missis. 697.

[4] Stat. Misso. (1835,) p. 228, § 1; Rev. Stat. Misso. (1845,) p. 430, § 1.

[5] Stat. Kansas Ter. (1855,) p. 314, § 1; Comp. Laws Kansas, (1862,) p. 478, § 1.

[6] Rev. Code, Dist. Col. (1857,) p. 199, § 2. This is a substantial re-enactment of the Virginia act of 1785. See ante, § 12.

[7] Stelle *v.* Carroll, 12 Peters, 201.

gent rule is applied, and the widow may have dower in proportion to the interest which the husband has acquired in the estate by partial payment; always, however, subject to the lien of the vendor for the unpaid purchase money.

38. In the early Virginia cases, after the passage of the act of 1785, it was assumed that, in order to confer dower in equitable estates, the husband must have such an equity as would authorize a court of chancery to decree the legal estate.[1] And in Kentucky the same doctrine was applied in several cases. Thus, in Herron *v.* Williamson,[2] dower was refused because the contract of purchase was in parol, and could not be enforced in the courts of that State. So in Pugh *v.* Bell,[3] full payment of the purchase money was held essential to the enforcement of a claim to dower. "We are apprised of cases," the court said, "in which it has been held that where the husband acquired a clear equity by contract for purchase and payment of the price, the widow was entitled to dower. But the right of Bell was not perfect in equity. Miller had not been paid the whole of the price. We can not, therefore, concur in the recognition of the widow's right to dower." In Bailey *v.* Duncan,[4] the husband, at the time of his death, was equitably entitled to a conveyance, and his widow was held dowable of the lands. But in Lindsey *v.* Stevens,[5] the court appear to have recognized the right of a widow to be endowed where a large proportion of the purchase money remained unpaid, upon contribution by her of her just share of the balance due. And in Brewer *v.* Van Arsdale,[6] it was expressly held, contrary to the ruling in the previous cases above referred to, that dower might be claimed in lands which the husband held under an executory contract, although the purchase money was not all paid by him. In this case the lands were sold, after the death of the husband, by the guardian of the children, under an order of court, and a portion of the proceeds of the sale applied in payment of the balance due on the purchase money, and the widow was adjudged entitled to dower in the surplus. The court said: "The circuit judge, assuming that the

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[1] Rowton *v.* Rowton, 1 Hen. & Mun. 92; Claiborne *v.* Henderson, 3 Hen. & M. 322, 382.

[2] Herron *v.* Williamson, Littell's Sel. Cas. 250.

[3] Pugh *v.* Bell, 2 Mon. 125.

[4] Bailey *v.* Duncan, 4 Mon. 256. See, also, Stevens *v.* Smith, 4 J. J. Marsh. 64.

[5] Lindsey *v.* Stevens, 5 Dana, 104.

[6] Brewer *v.* Van Arsdale, 6 Dana, 204.

title of the intestate was only equitable, and that such an interest unpaid for, did not entitle his widow to dower, therefore charged the plaintiff as guardian, with the whole amount for which he had sold the land, and in this, there was, as it seems to us, manifest error. Had the title of the intestate appeared to have been equitable only, we are of opinion that if the heirs were entitled to a specific execution, the widow was entitled to dower. It does not appear that anything but the payment of the entire consideration could have been necessary to make their equity perfect; and that payment they might have compelled the administrator to make, as far as he had available assets. To entitle a widow to dower in an equitable estate, it is not indispensable that her husband should have been entirely unindebted for it. If, at his death, his equity was available, his heirs and widow had a right to obtain the legal title by paying whatever remained due. Whenever the heirs are entitled by descent, the widow may have dower *on equitable terms*." In the case of Gully *v.* Ray,[1] decided as late as 1857, the court, referring to the earlier decisions, made use of this language: "Since the law in respect to trust estates was changed by statute, it has been decided that the widow is entitled to dower where the husband had such an equitable title as would have authorized a court of chancery to compel the vendor to convey to him the legal estate." No allusion was made to Brewer *v.* Van Arsdale, nor to the doctrine as there held, nor did the case call for a decision upon the point above stated. In this condition of the reported cases it is somewhat difficult to determine, satisfactorily, the existing rule in Kentucky upon this subject. But until Brewer *v.* Van Arsdale shall be authoritatively overruled, it would seem that the doctrine of that case should be regarded as furnishing the principle upon which a widow may be endowed in that State, of equitable interests resulting from executory contracts of purchase.

39. Although the question is not expressly determined in Pennsylvania, the courts of that State, nevertheless, manifest a disposition to regard a complete equitable title as essential to dower. Thus, in Pritts *v.* Ritchey,[2] it is said: "It is true that we treat a complete equitable title as equivalent to a legal seizin; but we should sadly misapply this rule if we should apply it at all to a case where there

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[1] Gully *v.* Ray, 18 B. Mon. 107.

[2] Pritts *v.* Ritchey, 29 Pa. St. (5 Casey,) 71, 77. In this case the contract had been assigned by the husband during the coverture, and completed by the assignee.

had been such a failure to complete the title as there has been here. We do not treat as done what is contracted to be done; but only such contracts as lack merely a non-essential form in order to their full completion. Where a contract is executed, lacking only the conveyance, we treat it as conveyed."[1]

40. The same principle has been adopted in New Jersey. It was there held that the widow might have dower of an equity if the husband was the real owner of the land, and had a right, at any time, to have a conveyance to himself of the legal title and estate in possession.[2] But the court refused to extend this doctrine further. "This," said the chief justice in the case cited, "satisfies the words of the statute, and I can not carry them so far as to give the widow dower at law of a purely equitable estate out of lands, of which lands her husband never had, and never could have, seizin in law or in deed."

41. The rule is the same in Illinois. In a recent case determined in that State, the court, after referring to their statute, make use of this language: "This enactment has excluded mere contracts for the purchase of real estate, unless the title shall be completed after the husband's death. But it does embrace a purchase of land by the husband where the purchase money has been fully paid by the husband, and he was, at the time of his death, in a position to enforce a conveyance by a bill for a specific performance."[3]

42. In Alabama it is well settled that a widow is not dowable of an *imperfect* equity.[4] And it is held that an equity is perfect only, when full payment is made.[5] Therefore, where the husband purchased land of the government, and received certificates for title when the purchase money should be paid, but died before completing the payment, it was held that his widow had no right of dower in the land.[6] So a widow was held not entitled to dower in land purchased of the United States, but afterwards forfeited.[7]

43. In New York it is held that a widow may be endowed of

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[1] See, also, Evans *v.* Evans, 29 Pa. St. (5 Casey,) 277.

[2] Yeo *v.* Mercereau, 3 Harr. 387.

[3] Owen *v.* Robbins, 19 Ill. 545; approved in Wooley *v.* Magie, 26 Ill. 526.

[4] Crabb *v.* Pratt, 15 Ala. 848; Gillespie *v.* Somerville, 3 Stew./& Port. 447; Lewis *v.* Moorman, 7 Port. 522; Rogers *v.* Rawlings, 8 Port. 825; Edmondson *v.* Montague, 14 Ala. 370.

[5] Edmondson *v.* Montague, 14 Ala. 370.

[6] Gillespie *v.* Somerville, 3 Stew. & Port. 447.

[7] Rogers *v.* Rawlings, 8 Port. 825.

equitable estates although the purchase money is not fully paid, subject, however, to the vendor's lien for the residue.[1] The same rule prevails in Ohio,[2] Tennessee,[3] Maryland,[4] North Carolina,[5] and Iowa.[6] In Indiana, an early statute[7] giving dower in equitable estates was construed against the widow with some degree of strictness. In a case in which the husband purchased real estate and obtained a title bond therefor, but died without paying any part of the purchase money, or receiving a conveyance, and the land was afterwards sold by his executors, the court refused to endow the widow of any portion of the proceeds, although the sale produced a considerable surplus beyond what was required to discharge the purchase money. The court said that neither the deceased "nor his heirs ever had the right to compel a specific performance of the contract which he held for the property; they had not the legal title, nor the equity to enforce a legal title. His widow can not complain that the price of the lot was paid with funds to a distributive share of which she would otherwise have been entitled. The lot paid for itself by the application of a part of the avails of the executor's sale to the discharge of the purchase money due to Stanton, and as the rest of the proceeds of that sale, as well as all the personal property of the estate, was applied to the satisfaction of other debts of Grentner, nothing was left for distribution."[8] But subsequently it was held that where the purchase money remained unpaid, the widow of the vendee had an equitable right to be endowed of the interest during her life, of one-third the amount produced by a sale of the land, over the unpaid purchase money and costs.[9] The following provision was also carried into the Revised Statutes of 1838: "The husband shall be considered equitably entitled to any real property for which he has made a contract, in proportion to the

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[1] Hawley *v.* James, 5 Paige, 318; Church *v.* Church, 8 Sandf. Ch. 434.

[2] Smiley *v.* Wright, 2 Ohio, 507; McDonald *v.* Aten, 1 Ohio St. R. 293; 1 Swan & Critch. Stat. 595, § 149.

[3] See Thompson *v.* Cochran, 7 Humph. 72.

[4] Miller *v.* Stump, 8 Gill, 304; Steuart *v.* Beard, 4 Md. Ch. Decis. 319.

[5] Thompson *v.* Thompson, 1 Jones' N. C. Law R. 430; Klutts *v.* Klutts, 5 Jones' N. C. Eq. 80.

[6] Barnes *v.* Gay, 7 Clarke, (Iowa,) 26; Rev. 1860, § 2477.

[7] R. C. 1831, p. 209, § 12.

[8] Smith *v.* Addleman, 5 Blackf. 406.

[9] Malin *v.* Coult, 4 Ind. 585. See, also, Crane *v.* Palmer, 8 Blackf. 120.

purchase money actually paid in his lifetime."[1] The Revised Statutes of 1843 were still more full and explicit upon this point.[2]

The Revised Code of Mississippi contains the following provision:—

When any person shall die possessed of lands purchased, the payment for which has not been completed, and no title has been made, such lands shall be subject to the dower of the widow, but only according to the value of the interest of the deceased, unless she will contribute her proportion of the purchase money to complete the payment.[3]

44. Where the vendor retains the legal title as a security for the payment of the purchase money, it is uniformly held that his lien is paramount to the dower of the widow of the vendee.[4] And this principle was applied in a case where the lands of a decedent were sold as incapable of division, and purchased in by one of the heirs, who gave bond for the purchase money, but failed to procure a conveyance. It was held that his widow could not be endowed to the prejudice of the coheirs who retained a lien on the lands for their shares of the purchase money.[5] So where the purchaser took a title bond conditioned for a conveyance on full payment of the purchase money, and paid a large proportion of it, but died leaving the balance unpaid, and the lands were sold under proceedings to enforce the lien, and were bid in by the vendor for a sum less than the balance due, it was held that the widow of the purchaser had no dower in the premises.[6] The sale, in such case, extinguishes or divests her interest in the lands, and she must look for endowment to the surplus moneys, if any, remaining after discharging the lien of the vendor. And it has been held that if the purchase money be not paid, the widow may go into a court of equity and compel a sale of the lands for the satisfaction of the lien thereon, in order to

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[1] Rev. Stat. 1838, p. 238, § 12.

[2] Rev. Stat. 1843, p. 428, §§ 80–83.

[3] Rev. Code Missis. (1857,) p. 468, art. 166. See, also, Torrence v. Snider, 27 Missis. 697.

[4] Crane v. Palmer, 8 Blackf. 120; Malin v. Coult, 4 Ind. 535; Nax. Lit. & Benev. Inst. v. Lowe, 1 B. Mon. 257; Willett v. Beatty, 12 B. Mon. 172; McClure v. Harris, 12 B. Mon. 261; Warner v. Van Alstyne, 3 Paige, 513; Church v. Church, 3 Sandf. Ch. 434; Miller v. Stump, 3 Gill, 304; Steuart v. Beard, 4 Md. Ch. Decis. 319; Firestone v. Firestone, 2 Ohio St. R. 415; Pritts v. Ritchey, 29 Pa. St. (5 Casey,) 71; Barnes v. Gay, 7 Clarke, (Iowa,) 26; Thompson v. Cochran, 7 Humph. 72; Kirby v. Dalton, 1 Dev. Ch. 195; Wilson v. Davisson, 2 Rob. Va. 384. See post, ch. 25.

[5] Miller v. Stump, 3 Gill, 304.

[6] Crane v. Palmer, 8 Blackf. 120.

render her right to be endowed of the surplus available.[1] If the vendor take proceedings to enforce his lien after the death of the vendee, it is necessary, in order to conclude the rights of the dowress, that she be regularly made a party to the proceedings, and have her day in court.[2]

The husband must be possessed of the equity at the time of his death.

45. The general rule is that if the husband, during his lifetime, dispose of any equitable estate he may have in lands, the dower right of his wife therein will be defeated. It is only in such equitable interests as he may possess at the time of his death, that she can claim dower. "The principle of the revised statutes," says the chancellor in Hawley *v.* James,[3] "extends only to those cases in which the equitable interest of the husband in the trust property continues down to the time of his death, so as to be inheritable by his heirs. And if he aliens it in his lifetime, the widow will not be entitled to dower therein, as against the grantee." And this is the general doctrine of the authorities, and in some States is expressly declared by statute.[4]

46. When this question first arose in Kentucky, it was regarded by the courts as difficult of solution. We have seen that by construction, the provisions of the statute of 1796 giving dower in the estate of the *cestui que trust*, were extended to estates acquired by executory contract, upon the principle that when the consideration was paid, the vendor was to be regarded as holding the legal title in trust, or for the use of the vendee.[5] And, under the language of

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[1] Thompson *v.* Cochran, 7 Humph. 72; Daniel *v.* Leitch, 13 Gratt. 195.

[2] McArthur *v.* Porter, 1 Ohio, 99; Willett *v.* Beatty, 12 B. Mon. 172.

[3] Hawley *v.* James, 5 Paige, 318, 453.

[4] Pritts *v.* Ritchey, 29 Pa. St. (5 Casey,) 71; Junk *v.* Canon, 34 Pa. St. (10 Casey,) 286; Bowie *v.* Berry, 1 Md. Ch. Decis. 452; Purdy *v.* Purdy, 3 Md. Ch. Decis. 547; Smiley *v.* Wright, 2 Ohio, 506; Miller *v.* Wilson, 15 Ohio, 108; Rands *v.* Kendall, Ibid. 671; Owen *v.* Robbins, 19 Ill. 549; Wooley *v.* Magie, 26 Ill. 526; Barnes *v.* Gay, 7 Clarke, (Iowa,) 26; Lobdell *v.* Hayes, 4 Allen, 187, 191; Hamilton *v.* Hughes, 6 J. J. Marsh. 581; Lawson *v.* Morton, 6 Dana, 471; Heed *v.* Ford, 16 B. Mon. 114; 2 Stanton's Ky. Rev. Stat. p. 27, art. 4, § 13; 1 Swan & Critchf. Stat. (Ohio,) p. 516, § 1; Rev. Code N. C. (1855,) p. 602, § 6; Rev. Code Missis. (1857,) p. 468, art. 166; Code Tenn. (1858,) p. 473, § 2398. In Edmondson *v.* Montague, 14 Ala. 370, the court were in doubt upon this point. See, also, ante, ch. 19, § 25.

[5] See ante, §§ 13, 14.

that statute, it was somewhat problematical whether, when the vendee had thus acquired a perfect equitable estate, the dower right of the wife did not become fixed, and beyond the power of the husband to divest by his individual act of alienation. But the point was resolved against the widow: "If it (the statute) should be construed to give the wife a right of dower in such cases," the court said in Hamilton *v.* Hughes,[1] "by making the right attach as soon as the husband acquires such an equity during the coverture, then she has a dower right which can not be defeated but by her own act, and unless she conveys her right according to the forms prescribed by law, she may assert it after her husband's death. It follows that in order to get clear of the wife's dower in such case, it would be necessary for her husband to execute a formal deed of conveyance, with a regular relinquishment of dower on the part of the wife, when the husband had an equitable interest only. Besides, title bonds for land are made assignable by law. The obvious intention of the act regulating assignments, was, to vest the entire interest in the assignee, and this act would be defeated if there was an interest existing in the wife which could not be transferred. We are, therefore, of opinion that the said 14th section does not embrace implied trusts, except such as the husband shall hold at the time of his death. These, and these only, are included in the former adjudications of this court. To extend the statute further, and to make it embrace all cases where the husband, any time during the coverture, may have possessed an equity and parted with it before his death, would open another Pandora's box." Notwithstanding this decision, the Circuit Court, in the case of Lawson *v.* Morton, allowed dower to the widow of a vendee who had disposed of his beneficial interest in his lifetime, but on appeal the decree was reversed.[2] It would seem, however, that this construction of the statute was not entirely satisfactory to the profession, for as late as 1855 the question was again pressed upon the attention of the court, and it was insisted that the doctrine of Hamilton *v.* Hughes was inconsistent with the principles laid down in Bailey *v.* Duncan,[3] and affirmed in subsequent cases, giving dower in equitable estates resulting from executory contracts, and that the opinion in the case first named presented no satisfactory

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[1] Hamilton *v.* Hughes, 6 J. J. Marsh. 581, (1831.)

[2] Lawson *v.* Morton, 6 Dana, 471.

[3] Bailey *v.* Duncan, 4 Mon. 256; ante, § 14.

reason for the limitation it placed on the right of the wife. But the court, in an elaborate opinion, adhered to the views expressed in that case, and, principally for the reasons there stated, held the dower of the wife in this class of equitable estates defeated by the alienation of the husband.[1] The question is now set at rest in Kentucky by a statute embodying the doctrine of these cases.[2]

47. In Pennsylvania the point was first judicially determined against the dowress, in Pritts *v.* Ritchey,[3] afterwards approved in Junk *v.* Canon.[4] In the latter case the vendor executed and delivered to his agent a deed for the lands sold, with instructions to deliver it to the vendee on payment of the purchase money. The purchaser parted with his interest to a third person and afterwards died. Subsequently the assignee paid the purchase money to the agent of the original grantor, and received the deed left in his hands as above stated. It was held that the widow of the first purchaser had no dower in the lands.

48. The rule allowing the husband to alienate his equity free from the incumbrance of dower, also permits him to agree to a rescission of the contract. Thus, A. and B. purchased land to be divided between them by a specific line. A. was to pay the whole purchase money to the vendor, and B. was to pay A. his portion thereof within a certain time. After B. had paid part of such portion to A. the agreement between them was rescinded, A. agreeing to take B.'s part of the land, and the amount paid by B. was credited on another account. B. was never in possession of the land. It was held that B. had not such an equity as would, on his decease, entitle his widow to dower, as the contract between him and A. was executory, and such as it was competent for them to rescind.[5]

49. It is also held that dower does not attach to land where the husband has conveyed before he had either a legal or equitable title. Thus, where A. without any title in himself, conveyed land to B. for which he afterwards received a certificate of purchase from the land office, upon which a patent was subsequently issued to A., it

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[1] Heed *v.* Ford, 16 B. Mon. 114.

[2] 2 Ky. Rev. St. by Stanton, p. 27, art. 4, § 13.

[3] Pritts *v.* Ritchey, 29 Pa. St. (5 Casey,) 71.

[4] Junk *v.* Canon, 34 Pa. St. (10 Casey,) 286.

[5] Wheatley *v.* Calhoun, 12 Leigh, 264. See, also, Owen *v.* Robbins, 19 Ill. 549, 554, accord.

was adjudged that the wife of the latter was not dowable of the land.[1]

Rule where the husband receives the legal title after assigning his equitable interest.

50. If, after the vendee has assigned his equitable estate, the legal title be conveyed to him by the vendor, equity regards him as holding it in trust for his assignee, and therefore no right of dower arises in behalf of his wife. The case of Winn *v.* Elliott[2] appears to conflict somewhat with this doctrine. In that case, one Elliott, who held the bond of the patentee, Gillaspie, for title, sold the land to the Winns, and executed to them his bond for a conveyance. Gillaspie afterwards conveyed to Elliott, and the latter died in possession without having conveyed to the Winns. Being thus seized of the legal title, and having actual possession at his death, the court held his widow entitled to dower, notwithstanding the previous sale by him, and the fact that his bond for the title was still outstanding. But in Heed *v.* Ford,[3] where the purchaser transferred his interest, and afterwards received a conveyance of the legal title, it was held that he did not, by virtue thereof, acquire any such beneficial interest or seizin in the land as entitled his widow to dower. In another case the husband sold his interest to a third person and put him in possession. Afterwards the heirs of the assignee, in order to obtain from the assignor a conveyance with covenants of warranty, procured a deed to be made to him by the vendor, and he thereupon conveyed the title to them. "Here," the court said, "the husband had parted with his equitable title to the land, and with the possession of it, before he obtained the legal title. He held the legal title in trust: it conferred upon him no beneficial interest in the land, but was acquired for the benefit of, and conveyed immediately by his deed to the heirs of his vendee. It was not such a beneficial seizin, therefore, as entitled the wife to dower."[4]

51. The following case was decided in Maryland: The husband purchased land in 1832, during coverture, taking a bond for a conveyance from the vendor. In 1839 he sold the land, and executed

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[1] Wooley *v.* Magie, 26 Ill. 526.

[2] Winn *v.* Elliott, Hardin, (Ky.) 482.

[3] Heed *v.* Ford, 16 B. Mon. 114.

[4] Gully *v.* Ray, 18 B. Mon. 107. See, also, ante, § 49.

to his vendee a bond with condition, upon payment of the purchase money, to convey the title in fee, clear of incumbrance. In 1843, he completed his payment of the purchase money and took the legal title to himself from his vendor. He subsequently died without having executed a conveyance to his vendee, the latter not having paid all the purchase money. It was held that his widow was entitled to dower; but that, as part of the money received by the husband from his vendee was applied by him in payment for the land, this sum must be deducted from its value at the death of the husband, before the assignment of dower.[1] In this case the court, while recognizing the general doctrine that the husband, by parting with his equitable title defeats his wife's dower, nevertheless took a distinction between a present absolute assignment, and a mere outstanding *executory* agreement by the husband to transfer his interest upon payment of the consideration by the assignee. "In the cases which have been decided in this State since the act of 1818, ch. 193, which gives the wife dower in an equitable estate," the court observed, "the wife was denied her dower because the husband's estate was divested during his lifetime. No case has been decided in which it has been held that a mere executory contract to convey by the husband, has had the effect to defeat the dower, and certainly no case can be found in which the wife's right to dower in a legal estate of inheritance in the husband, either in deed or in law, has been defeated by the act of the husband, without the concurrence of the wife, where the act was performed after the inception of the right of dower. Here, the contract of 1839, which was made after the right to dower had attached, is relied upon. But the contract was never consummated; nor had the purchaser, in the lifetime of the husband, nor has he now, put himself in a condition, by paying the money, to demand its fulfillment. And after the date of it, the husband took to himself the legal title, which deprived him of the power of defeating his wife's right to dower without her consent."

52. It would seem that dower is defeated as well where the husband *mortgages* his equitable interest, as where he transfers it absolutely; at least as against the mortgagee. Thus, if the husband, being possessed of an equitable estate, execute a mortgage of the land in the usual form to a creditor, and afterwards the legal title is conveyed to him, and then the creditor forecloses the

[1] Bowie *v.* Berry, 3 Md. Ch. Decis. 359.

mortgage and sells the land, the purchaser, it is apprehended, would take the title unincumbered by dower.[1] The mortgage would operate as a conditional assignment of the equitable estate, good as against the mortgagor and his wife,[2] and upon breach of the condition, and enforcement of the lien, they would be divested of all interest in the land. This point appears to be fully met by the case of Miller *v.* Stump,[3] decided in Maryland. There the husband, during the coverture, mortgaged an equitable estate then held by him, and it was decided that his widow could not claim dower in the land to the prejudice of the mortgagee. The court further held that if, upon a sale of the equity after the husband's death, it brought more money than was required to satisfy the mortgage debt, the widow might be endowed of the surplus, but that this was a matter with which the purchaser had nothing to do. The premises, in his hands, were entirely discharged from her claim.[4]

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[1] This point was expressly so held by S. Finch, J., in a case determined in the Court of Common Pleas of Knox County, Ohio; Welker *v.* Israel, February Term, 1858.

[2] In Philly *v.* Sanders, 11 Ohio St. R. 490, a mortgage, with covenants of warranty, of an equitable estate, was held good against a mortgagee whose mortgage was executed after the mortgagor had acquired the legal title.

[3] Miller *v.* Stump, 3 Gill, 304.

[4] See, also, upon this point, Purdy *v.* Purdy, 3 Md. Ch. Decis. 547.

CHAPTER XXI.

DOWER UNDER THE DOCTRINE OF EQUITABLE CONVERSION.

§ 1. The doctrine of equitable conversion.
2–11. Dower in money directed to be converted into land.
§ 12. Dower in land ordered to be turned into money.
13–15. The right and effect of election.

The doctrine of equitable conversion.

1. It is a principle in courts of equity that those things which are agreed or directed to be done, are to be regarded as having been actually performed; and from the application of this principle has sprung what is familiarly known as the doctrine of *equitable conversion*, which is defined to be "that change in the nature of property by which, for certain purposes, real estate is considered as personal, and personal estate as real, and transmissible and descendible as such."[1] In equity, therefore, by force of this doctrine, money agreed or directed to be laid out in land, and land agreed or ordered to be sold and turned into money, are to be considered as that species of property into which they are respectively agreed or directed to be converted.[2] From this statement of the rule in question, it will be readily seen that it occupies an important place in the law of dower as administered in courts possessing equitable powers, and is deserving of particular and careful consideration, in so far, at least, as a correct application of the rule affects the question of the right of dower, either in money which, by express direction, is to be employed in the purchase of land; or in land which, by like direction, is to be converted into money.

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[1] Francis' Maxims, Max. 18; Leigh & Dalzell on Equit. Conv. 1, 2.

[2] Fletcher *v.* Ashburner, 1 Bro. C. C. 497; Wheeldale *v.* Partridge, 5 Vesey, Jr. 396; Craig *v.* Leslie, 3 Wheat. 563; Peter *v.* Beverly, 10 Peters, 532, 563; 1 Jarman on Wills, ch. 19, p. 523. See 1 Lead. Cas. in Eq. 598, [*541], *et seq.*, notes to Fletcher *v.* Ashburner, where the numerous English and American cases bearing upon this subject are collected and considered; Leigh & Dalzell on Equit. Conv. 59, 87.

Money directed to be converted into land.

2. The rule that money, imperatively directed to be laid out in land, is, in equity, completely clothed with all the essential qualities, and impressed with all the material properties of real estate, is so well settled at this day as to admit of no question. Money ordered to be thus applied descends as real, and not as personal estate. Its effectual disposition by will by the party entitled thereto, requires the observance of all the formalities attending a devise of land. It will pass under a general devise of all the *lands* of the person for whose benefit the conversion is directed to be made, while it will not pass as *money* by a general bequest to a legatee.[1] In the terse but comprehensive language of the learned English editor of Leading Cases in Equity, "the authorities show that money agreed or directed to be laid out in land, becomes land so completely as to acquire *all* the property of land."[2]

3. The general doctrine is undoubtedly as stated by the writer just referred to, and carried to its natural and logical result, would seem to establish a right of dower in money directed to be laid out in land, in behalf of the widow of the beneficiary of the fund. Acting, apparently, upon this reasonable view of the subject, Chancellor Kent has stated the rule as follows: "In equity lands agreed to be turned into money, and money into lands, are considered as that species of property into which they were agreed to be converted; and the right of dower is regulated in equity by the nature of the property in the equity view of it."[3] While the doctrine thus broadly stated appears to be consonant to principle, and a necessary incident of the rule of equitable conversion, as established and applied in courts of equity, a careful consideration of the authorities bearing more directly upon the question of the right of dower as affected by this rule, will show that, by a singular anomaly in the English law, money directed to be converted into land, although held to be and treated in equity as land for all other purposes, including the right to tenancy by the curtesy, is declared *not* to be land for the purposes of dower.

4. The case of Sweetapple *v.* Bindon,[4] decided in 1705, is gener-

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[1] See authorities cited in preceding note.

[2] 1 Lead. Cas. in Eq. 538, [*541].

[3] 4 Com. 50.

[4] Sweetapple *v.* Bindon, 2 Vern. 536.

ally regarded as having settled the question that tenancy by the curtesy attaches, in equity, upon money directed to be laid out in land. In that case a testatrix bequeathed £300, to be laid out in land, and settled to the use of her daughter and her children, and if her daughter died without issue, to go over. The daughter married and had a child by her husband. Before the money was laid out in land, the daughter and her child both deceased. Upon bill filed by the husband, it was held that he might either have the money laid out in land, and settled on himself for life, as tenant by the curtesy, or in lieu of the profits of the land, might have the interest of the money during his lifetime. The correctness of this decision has been recognized in the cases cited below.[1] But where the property is set apart for the sole and separate use of the wife this rule does not apply, for in such case the husband could neither come at the profits nor the possession, and therefore could have no seizin at law nor in equity, which is an essential requisite to enable the estate of tenancy by the curtesy to attach.[2]

5. It is to be observed that the case of Sweetapple *v.* Bindon was determined at a period when the doctrine of equitable conversion was comparatively in its infancy. It was not until about the time of Charles II. that the principles upon which the rule is founded were generally acted upon in courts of equity, and the case of Lawrence *v.* Beverleigh,[3] decided about the year 1670, only thirty-five years before Sweetapple *v.* Bindon arose, seems to be one of the earliest cases in which the rule was applied in a definitive form.[4] There is nothing in the books of that early day indicating a disposition on the part of the courts to make any distinction, in this class of cases, between the right to dower and the right to tenancy by the curtesy.

6. We meet with no reported case in which allusion is made to the question with reference to dower, until we come to Crabtree *v.* Bramble,[5] determined by Lord Chancellor Hardwicke, in March, 1747. The controversy in that case was between the personal representa-

[1] Otway *v.* Hudson, 2 Vern. 583, 585; Fletcher *v.* Ashburner, 1 Bro. C. C. 498; Cunningham *v.* Moody, 1 Vesey, Sr. 174; Dodson *v.* Hay, 3 Bro. C. C. 404. See Leigh & Dalzell on Equit. Conv. (5 Law Lib.) 62; 1 Lead. Cas. in Eq. 599, [*542]; 1 Jarm. on Wills, p. 523 *et seq.*

[2] Hearle *v.* Greenbank, 1 Vesey, Sr. 298, 307.

[3] Lawrence *v.* Beverleigh, 2 Keble, 841.

[4] Leigh & Dalzell on Equit. Conv. (5 Law Lib.) 2.

[5] Crabtree *v.* Bramble, 3 Atk. 680.

tive and the heir at law of the party for whose benefit land had been ordered to be converted into money; and the principal question was as to what acts were necessary on the part of the beneficiary of the fund proposed to be raised from the sale, to constitute a valid election to take the land in its original condition, so as to work, in the estimation of courts of equity, a reconversion of the fund into real estate. In the course of the discussion of this question the lord chancellor made the following observations: "It must be allowed equity follows the contracts of parties, in order to preserve their intent, by carrying it into execution, and depends on this principle, that what has been agreed to be done for valuable consideration, is considered as done, and holds in every case *except in dower*." Next in order is the case of Cunningham *v.* Moody,[1] decided by the same judge in December, 1748, which, among other points, involved the question as to the right to tenancy by the curtesy in money directed to be laid out in land. The lord chancellor disposed of this question with these remarks: "Next as to the consequences of this; (the failure of a sufficient election on the part of the wife to take the fund as money.) The first is, that, as she would be tenant in tail of the land, and had the same interest in the money, the husband surviving is entitled to be tenant by curtesy, according to the case of Sweetapple *v.* Bindon, 2 Vern. 536, *although the court does not give that indulgence in the case of dower*." We find no further reference to this question in any reported case until in 1779, when Fletcher *v.* Ashburner[2] came up for determination. This is very generally regarded as the leading case upon the doctrine of equitable conversion. In delivering his opinion, Sir Thomas Sewell observed "that nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given: whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund, or the contracting parties may make land money, or money land. The cases established this rule universally. If any difficulty

[1] Cunningham *v.* Moody, 1 Ves. Sr. 174.
[2] Fletcher *v.* Ashburner, 1 Bro. C. C. 497.

has arisen, it has arisen from special circumstances. In the case of Sweetapple *v.* Bindon, 2 Vern. 536, it was determined that a husband was entitled to money to be laid out in land as tenant by the curtesy, *and although it is held that a wife is not entitled to dower in a similar case*, yet it is allowed that it is so held because cases have been determined, *and not from any principle.*"

7. Upon the strength of the opinions thus expressed by Lord Hardwicke and Sir Thomas Sewell, as well as upon the general principle of the English law denying dower in equitable estates, Mr. Park insists that a woman is not dowable of money directed or agreed to be laid out in land.[1] In this conclusion he is supported by Mr. Jacob, who, in his edition of Roper on Husband and Wife, remarks "that a widow will not be entitled to dower out of an estate agreed to be purchased by her husband, but not conveyed to him, or out of money agreed or directed to be invested in land."[2] Leigh and Dalzell, in their work on Equitable Conversion, incline to the same opinion: "It has been decided," they say, "that although the husband is entitled, where there is an equitable seizin only, to be tenant by the curtesy of a fund impressed with real uses, yet the wife is not likewise entitled to her dower."[3] So in Fonblanque's Equity it is laid down as the rule, that money decreed to be laid out in land is considered as land *inter alia*, so as to be subject to the curtesy of the husband, but it will not entitle a woman to dower.[4]

8. We have already sufficiently explained the origin and cause of this incongruity in the law, and shown that it proceeded entirely from a desire on the part of the English equity judges to maintain the security of titles to real estate.[5] "It has been so long and so clearly settled," said Lord Redesdale, "that a woman should not have dower in equity who is not entitled at law, that it would be shaking everything to attempt to disturb the rule."[6] But however forcibly the reasoning in the case just referred to may apply with respect to estates conveyed in trust for the use of the husband, or to other equitable interests in land acquired by him under the system of conveyancing adopted in England, founded on the common

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[1] Park on Dower, 136.

[2] 1 Roper on Husb. and Wife, by Jacob, 356.

[3] Leigh & Dalzell on Equit. Conv. 62.

[4] 1 Fonblanq. Eq. 420; accord. 1 Madd. Ch. 371. [5] Ante, ch. 19, §§ 13, 17.

[6] D'Arcy *v.* Blake, 2 Sch. & Lef. 387. See a full quotation from this opinion, ante, ch. 19, § 17.

understanding of conveyancers that dower did not attach upon equitable estates, it is not so clear that it applies with the same degree of force to that class of cases which comes within the doctrine of equitable conversion. Where money directed to be laid out in land has been invested during the lifetime of the husband, and the title conveyed to him, the conversion is then complete at law as well as in equity, and no question would remain as to the right of dower. And where the death of the husband has intervened before the investment is made, and there has been no attempt by him in his lifetime to change the nature of the property by an election to take it as money, so that it remains in equity impressed with the character of real estate, it can hardly be said with truth, that titles to real property would be imperiled, even in the condition of things supposed by Lord Redesdale, by permitting the widow to be endowed of the fund standing thus undisposed of and uninvested, in the same manner that the husband, in similar cases, has been allowed to take as tenant by the curtesy. The denial of this right to the widow is admitted to be a violation of principle, and, as before stated, the result purely of a desire to maintain the security of titles to real estate. This manifest departure from principle, it would seem, should be extended no further than the necessities which led to it require. If it be objected to this view that it would tend to embarrass the disposition by the husband of money directed to be invested in land for his benefit, upon the supposition that it would render the concurrence of the wife necessary to divest her inchoate right of dower therein, the answer is easy and obvious. The rule in equity which impresses upon money directed to be expended in the purchase of land, the character of land, also recognizes the right of the party in interest, at any time before the purchase is made, to elect to take the fund in its original and actual character of money;[1] nor is the consent of the wife at all necessary to render the act of election effectual and complete. In this manner the power of absolute disposition is preserved in the husband so long as the fund remains in its original shape, by the same rule which attaches to it in legal contemplation the qualities and attributes of real property. It is only where the husband dies while the fund is in this condition, and while, therefore, the rights of no third

[1] Lewin on Trusts, (24 Law Lib.) 679; Seeley v. Jago, 1 P. Wms. 389; Walker v. Denne, 2 Ves. Jr. 182; and see authorities cited in note, ante, § 1.

persons have intervened, that the reasonable application of the rule would accord to the widow the right of dower in the fund in its equitable character of real estate. Lord Hardwicke appears to have had this feature of the doctrine of equitable conversion in view, while considering the case of Cunningham *v.* Moody,[1] for he there made the right of the husband to hold as tenant by the curtesy, depend upon the question whether the wife, in her lifetime, had done any act sufficient in law to amount to an election, to take the fund directed to be laid out in land, as money. It was only upon determining this question in the negative, that the validity of the claim of the husband was recognized. And indeed it is a general, if not a universal rule, in those American States where dower in equities is given by statute, that the right is limited to such equitable interests as the husband possessed at the time of his death.[2] The present English dower act, which is more particularly referred to in the next section, contains a provision to the same effect.

9. The statute of 3 & 4 Will. IV. chapter 105, worked a great and radical change in the English law of dower as it previously existed. Indeed, it may be said to have effected, substantially, the entire abolition of the former system, inasmuch as it subjects the right of dower to the unlimited control of the husband. Among the changes introduced, however, is one in favor of the widow. The second section of the act reads as follows: "When a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy,) then his widow shall be entitled in equity to dower out of the same land."[3] It appears to have been the intention of the Real Property Commissioners who framed this law, to comprehend in the foregoing section all that class of cases in which, by force of the doctrine of equitable conversion, money is impressed with the character of real estate. In their report the commissioners use this language, which very clearly expresses their understanding as to the effect of the section: "We propose that dower should attach upon all estates of

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[1] Cunningham *v.* Moody, 1 Ves. Sr. 174; see ante, § 6.

[2] See ante, ch. 20, § 45.

[3] See Appendix. This act applies only to persons married after January 1, 1834.

inheritance in possession, excepting the species of property to which dower is not incident, *and on property considered in equity as real estate*, of or to which any husband dies seized or entitled in fact or in law, whether legally and beneficially, or beneficially, only, which, if belonging to the wife, would be subject to the husband's curtesy. . . . . By this enactment the artificial distinction between legal and equitable estates will be taken away." If it were not that the high legal character of the eminent gentlemen who composed that commission would seem to forbid it, the suggestion might be ventured that in preparing the section above given, language might have been selected that would express more clearly the intention to give dower in property considered in equity as real estate. The report is explicit enough, and, taken as a glossary, renders the meaning of the section perfectly obvious. But without the explanation thus furnished, it is not so manifest that an enactment which confers upon the widow the right of dower in an equitable interest in land, extends the right to property which is not in fact land, nor an interest in land, but is impressed with the fictitious character of real estate in a court of equity only. There is a plain difference between an equitable interest in *land*, and *money* which is merely *regarded* as land by virtue of an equitable fiction. In the one case the party has a right in specific real estate; in the other he has no such right until the money is actually invested. The doctrine of equitable conversion operates upon the *property*, rather than upon the *title*, leaving the latter to follow precisely the direction it would take at law upon complete performance of the act directed to be done. Therefore when money is directed to be invested in land, the title to which is to be conveyed to the party in interest, equity regards the fund as land, and the beneficiary as having the *legal* title thereto, precisely as if the investment had been made, and the title actually conveyed; not simply as having an equitable interest in real property. For these reasons it may admit of doubt whether the terms employed in the section to which reference has been made, if interpreted according to the usual understanding of the profession, would have the extended application intended for them by the commissioners who prepared the law. And upon this point it may be added that the English editor of Leading Cases in Equity, while giving it as his opinion that since the passage of the act, a woman is dowable of money directed to be laid out in lands of inheritance, is nevertheless exceedingly cautious as to the form in which that

opinion is expressed. "But since, by a singular anomaly," he says, "a woman was not entitled to dower out of an equitable estate, she was not dowable out of money directed to be laid out in land: Cunningham *v.* Moody, 1 Ves. 176; Crabtree *v.* Bramble, 3 Atk. 687; but now, by 3 & 4 Will. IV. c. 105, women married after the 1st of January, 1834, whose dower has not been barred, will be dowable out of equitable estates, it would *seem to follow* that they will be dowable out of money to be laid out in lands of inheritance."[1] No case has yet arisen in which the statute, upon this point, has received a judicial construction. The English text writers, however, appear disposed to acquiesce in the construction which the Real Property Commissioners intended it should receive, as declared in that portion of their report to which allusion has been made.[2]

10. In those States where dower is allowed in equitable interests in land, adopting by analogy the construction given to the second section of 3 & 4 Will. IV. chap. 105, the right to dower in money impressed in equity with the qualities of real estate, may be regarded as established.[3] And in those States where no such statutory provision exists, but where the general doctrine of equitable conversion is recognized as a rule of property, it remains for the judiciary to determine whether the symmetry of the rule shall be preserved; or whether, as in England before the legislation of 3 & 4 Will. IV., its just proportions shall be marred, to serve an ulterior purpose. The acknowledged reason which led the English courts to so wide a departure from principle in respect to this question, can be said to exist in but few, if indeed in any of the States of the American Union.

11. The American reports are barren of cases having a direct influence upon this particular phase of the subject. In Potts *v.* Cogdell,[4] a certain sum of money had been settled to the use of husband and wife for life, with remainder to their issue. The money was partially converted into land by the husband after the death of his wife. It was held that his second wife was entitled to dower in the land, although it was, in all other respects, to be treated as personalty. This case, it will be perceived, scarcely meets the point. In the first place, the money was not directed to be invested in land; and secondly, if such direction had been given, the conversion was

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[1] 1 Lead. Cas. in Eq. 599, [*542.]

[2] See 1 Washb. Real Prop. 181.

[3] See 2 Sugd. on Vendors, 234.

[4] Potts *v.* Cogdell, 1 Desaus. 454.

actual, and not fictitious. No other American case is to be found appearing to involve the question under consideration.

Land ordered to be turned into money.

12. It has already been shown that land ordered to be sold and converted into money, is treated in a court of equity as the latter species of property.[1] The conversion is there looked upon as having actually been made. One consequence naturally, and perhaps necessarily resulting from this principle is, that as a general rule, the widow of the party for whose benefit the fund is to be raised, is not entitled to dower therein. Thus, in Berrien *v.* Berrien,[2] where a testator by his will directed that the residuum of his estate, real and personal, should be sold by his executors, and the money arising from the sale divided among his children, it was held that the devisees took a vested interest in the proceeds of a sale of the estate, both real and personal, and that neither of the sons took such an estate in the land as would entitle his widow to dower. So in Coster *v.* Clarke,[3] five persons entered into an agreement for the purchase of real estate to be resold for profit. By the terms of the agreement it was stipulated that the title should be taken in the name of one of the five, and that he should hold the land and receive the avails for joint account until sales were effected, and the land converted into money. Title was made accordingly; and afterwards, upon bill filed for partition, sale, and account, it was held by the vice-chancellor that the land was not subject to dower. This decision was placed mainly upon the ground that by the agreement of the parties in interest, the land purchased had, in equity, lost its character of real estate, and become personalty.

The right and effect of election.

13. When we come to consider this subject with reference to the right of the intended recipient of the fund to take the land directed to be sold, instead of its proceeds, we encounter questions which, in the absence of judicial determination of the points involved, can not be very readily nor satisfactorily solved. Where there is but a single individual interested in the fund; or, if there be more than

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[1] Ante, § 1.

[2] Berrien *v.* Berrien, 3 Green's Ch. R. 37.

[3] Coster *v.* Clarke, 3 Edw. Ch. R. 428.

one, where they all concur in the act of election, no difficulty whatever can arise. Where parties are competent in law to its exercise, the power of election is very simple of execution, and in either of the cases above supposed, unless there be absolute incompetency by reason of some existing personal disability, there is no obstacle in the way of its easy performance. Any act clearly and unmistakably indicating a purpose to take the land in its original condition, and to dispense with a sale, will be sufficient to effect that purpose.[1] From that moment a reconversion is worked; the ownership of the realty is, in equity, vested in the party or parties in interest, and a conveyance of the title, where circumstances render such conveyance necessary, may be enforced. But where two or more persons are entitled to the fund, it is necessary that all should concur in the act of election in order to make it effectual to prevent a sale. No one singly has a right to elect that his own undivided share shall not be disposed of. A different rule prevails where money is directed to be invested in land, and in such case, any one of several parties interested may elect to take his share in money. The ground upon which this distinction rests is, that in the case of land ordered to be sold it is supposed the withholding of one or more of the undivided shares from the sale would prejudice the sale of the remaining shares; while in the case of money ordered to be invested in land, a portion of the fund may be invested quite as advantageously as the whole sum.[2]

14. As an illustration of the embarrassing questions which may possibly arise with respect to the right of dower, by reason of this distinction in the law as to the power of election, the following hypothetical case is presented for consideration. Suppose a testator to have died seized of land, and by his will to have directed a sale thereof by his executors for the benefit of his heirs at law. The fee in such case, it is supposed, would descend to and vest in the heirs, until divested by the execution of the power, according to the well-established rule that a mere naked power of sale in

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[1] See notes to Fletcher *v.* Ashburner, 1 Lead. Cas. in Equity; 1 Jarman on Wills, ch. 19, p. 523 *et seq.*

[2] Lewin on Trusts, (24 Law Lib.) 679; Fletcher *v.* Ashburner, 1 Bro. C. C. 500; Deeth *v.* Hale, 2 Moll. 317; Smith *v.* Claxton, 4 Madd. 494; Chalmer *v.* Bradley, 1 J. & W. 59; Seeley *v.* Jago, 1 P. Wms. 389; Walker *v.* Denne, 2 Ves. Jr. 182; notes to Fletcher *v.* Ashburner, 1 Lead. Cas. in Eq.

executors does not operate to vest in them the estate.[1] Suppose further, that pending the execution of the power, one of the heirs at law and beneficiaries of the fund, elects, so far as it is in his power to make an election, to take and hold his share as real estate; that the remaining heirs insist upon a sale, and that a sale is made accordingly. The right of dower attaching *sub modo* upon the estate taken by *descent*, would of course be defeated by the sale, for the estate itself would be defeasible and would terminate with the sale. But what would be the effect of the effort to exercise the power of election, as above supposed, upon the right of dower of the wife of the party making such attempt? If he were the only party in interest, the inchoate right of his wife would instantly attach. Does the fact that other parties are interested with him in the land, or in its proceeds, operate to prevent the right from attaching upon the share of the husband? A concurrence on their part in the act of election by the husband, would render the reconversion complete, and unquestionably perfect the right of dower. Is it in their power, and at their option, by refusing their concurrence, to control the right? If so the wife, so far as her dower estate is concerned, in a case of this character, is completely at the mercy of any one of the cotenants in interest with her husband. It seems hardly reasonable to make the right of the wife depend upon the caprice of third parties, or upon the conflicting views they may chance to entertain as to the expediency of a sale. The act of election by the husband, though not in itself sufficient to prevent a sale, may, with seeming propriety, be deemed sufficient in equity to entitle his wife to dower; for the sale goes on, not for his benefit, but to protect the interests of other parties. He is permitted to elect to take his proportion of money directed to be invested in land for the benefit of himself and others, and, in that way, to deprive his wife of dower therein. This privilege is granted him upon the assumption that an election in such case would not prejudice the rights of the

[1] 1 Sugden on Powers, (15 Law Lib.) 128, § 25; Vint *v.* The Heirs of King, 2 Amer. Law Reg. 712; Bergen *v.* Bennett, 1 Caine's Cas. 16; Snowhill *v.* Snowhill, 3 Zab. 447; Elle *v.* Young, Ibid. 478; Gest *v.* Flock, 1 Green's Ch. R. 108; Jackson *v.* Schauber, 7 Cowen, 187; Schauber *v.* Jackson, 2 Wend. 13, 57; Jackson *v.* Burr, 9 John. R. 104. By a special statute of Pennsylvania it is provided that a power of sale conferred upon executors by will shall have the effect to vest them with the estate. See Allison *v.* Wilson, 13 Serg. & R. 330, 332; but this is a palpable innovation upon the rule of the common law.

other parties interested. It seems difficult, therefore, to assign any good reason why, in a case of the other description, he should not be allowed to secure to his wife the right of dower, by electing to take land instead of money; or why third parties should be held to possess absolute control over the subject. A sale which is required to be made in order that the rights of others may not suffer injury, should not be permitted to work serious detriment to the interests of the wife. In the event of the decease of the husband between the date of the election by him, and the time of the sale under the power, and when it became a question whether she should have a portion of the husband's share of the fund for the support of herself and her children, or whether it should all be swept away by creditors, the injustice of a rule overruling her claim would be most glaringly apparent.[1] But questions of this nature, with all the complications which varying circumstances may create, must be left for future discussion and adjudication, as cases involving them may chance to arise.

15. An infant is held incompetent in law to make a valid election.[2] It follows, therefore, that where money is directed to be invested in land, or land is ordered to be converted into money, for the benefit of an infant, it is not in his power, by any act of his own, to change the character of the property in any respect. In the event that he has a wife, he can neither impair her right of dower in property regarded in equity as real estate; nor can he enable the right to attach upon land ordered to be sold. Nor does his guardian possess the power to elect for him;[3] but a court of equity, it is said, may exercise the power of election in his behalf.[4] A lunatic, for obvious reasons, is also incompetent to make a valid election.[5]

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[1] See 1 Jarman on Wills, 537, 538, and note.

[2] Carr *v.* Ellison, 2 Bro. C. C. 56; Van *v.* Barnett, 19 Vesey, Jr. 102; Burr *v.* Sim, 1 Wharton, 252, 265; 1 Lead. Cas. in Eq. 607, [*552.]

[3] Burr *v.* Sim, 1 Wharton, 252, 265; 1 Lead. Cas. in Eq. 617.

[4] Turner *v.* Street, 2 Rand. 404; Pratt *v.* Taliaferro, 8 Leigh, 419, 428; 1 Lead. Cas. in Eq. 617.

[5] Ashby *v.* Palmer, 1 Mer. 296; 1 Lead. Cas. in Eq. 607, [*552.]

CHAPTER XXII.

DOWER IN MORTGAGED ESTATES.

§ 1–7. Dower in equities of redemption at common law.
8–20. The rule in the United States.
§ 21. Dower in equities of redemption of mortgages for years.
22, 23. Dower in the estate of the mortgagee.

Dower in equities of redemption at common law.

1. UNTIL the passage of the late dower act, it was held in England that equities of redemption of mortgages in fee were not subject to dower. This was considered a necessary result of the rule excluding dower from equitable estates,[1] the right of redemption being regarded as a mere equitable title. But this question was not settled until after it had undergone some contrariety of decision. In Banks *v.* Sutton, already cited,[2] Sir Joseph Jekyll, after reviewing the authorities pertinent to the point, declared that he "did not know, nor could find any instance where a dower of an equity of redemption was controverted and adjudged against the dowress; and as there were authorities in cases less favorable, therefore he declared that the plaintiff, being the widow of the person entitled to the equity of redemption of the mortgage in question, (which was a mortgage in fee,) had a right of dower." And he accordingly directed her dower to be set out in the mortgaged premises, she to keep down one-third the interest of the mortgage debt.[3] But in the subsequent case of Dixon *v.* Saville,[4] the doctrine of Banks *v.* Sutton, after long argument, was overruled by the Lords Commissioners of the Great Seal, upon the ground that the question was nothing more than whether a woman was dowable of a trust. And Lord Loughborough remarked:

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[1] See ch. 19.
[2] Banks *v.* Sutton, 2 P. Wms. 719; ante, ch. 19, § 8.
[3] And see 2 Powell on Mortg. 731.
[4] Dixon *v.* Saville, 1 Bro. C. C. 326; 2 Powell on Mortg. 720; Lambert on Dower, 87.

"I confess I think it so much settled that it would be wrong to discuss it much." In this case there were peculiar equities in support of the wife's claim to endowment. The husband had distinctly intimated a wish that she should have dower in his estate, and was informed by the person who drew his will that she was entitled thereto. Acting upon this belief, the husband made but little provision for her by will. Among his bequests to her, however, were certain articles of plate, and a coach and horses, which were, in a measure, useless to her without an adequate support. But these features of the case appear to have had no influence on the minds of the members of the court. The doctrine of this case became the established rule in English practice,[1] and was rigidly adhered to until the law was changed in this particular by the 3d & 4th Will. IV. ch. 105.[2]

2. To such an extent was this technical doctrine carried, that actual payment of the mortgage debt at a period subsequent to the time when it became due, would not render the wife dowable unless the estate were reconveyed to the husband during his lifetime. Payment upon the day named in the condition would of itself operate to reinvest the husband with the estate, but a subsequent payment would not have that effect.[3] And, as a general rule, it was not material, with respect to the right of dower in equities of redemption, whether the mortgage were executed by the husband before the marriage, or by the husband and wife after the marriage. By joining her husband in levying a fine on a mortgage in fee, the right of dower of the wife became absolutely extinguished, and she could no more redeem such a mortgage than one made before the marriage.[4] To this general rule, however, there were certain exceptions, which will be noticed in the succeeding sections.[5]

3. According to English writers, where a fine was levied and its use either resulted to, or was declared in favor of the husband, *subject only to the charge created*, it would not necessarily bar the wife's

[1] Park, Dow. 138, 350, 351; Williams *v.* Lambe, 3 Bro. C. C. 264; D'Arcy *v.* Blake, 2 Sch. & Lef. 388; 4 Kent, 44; Tud. Cas. 46; 2 Crabb, Real Prop. 161; 1 Washb. Real Prop. 161; 1 Roper, Husb. and Wife, by Jacob, 357.

[2] Sec. 2. See Appendix.

[3] Park, Dow. 137.

[4] Ibid. 351.

[5] In his note to Sheafe *v.* O'Neil, 9 Mass. 9, 13, Mr. Rand says: "If a mortgage in fee be made after marriage, with the assistance of a fine or recovery, wherein the wife concurs, the wife may redeem, and so become entitled to dower." This proposition, to the extent stated, does not appear to be supported by authority.

dower, although she joined therein, and the fine itself imported a grant of the fee. This was the doctrine of the courts of law, and it appears to have been the understanding of the profession that the courts of equity were disposed to carry the point still further in favor of the dowress, and that cases might occur where a fine, although an *absolute* bar at law, would, in equity, on the ground of its having been levied *for a particular purpose*, only, be restrained from operating to exclude the widow from her dower, except to the extent of the particular purpose originally contemplated. It is difficult to glean with precision the circumstances under which this equitable relief would be dispensed. In a case shortly stated from a MS. report in 2 Eq. Abr. 385,[1] it is said: "A wife joined with the husband in a fine, in order to make a mortgage, which afterwards was not made; the husband died, and the wife brought a writ of dower and got judgment by default; and the heir could not be relieved against it *here*, [in equity,] as he would have been, if the fine had been a bar of her dower in equity as it was at law." The court must, therefore, have in effect decided, that the fine was no bar in equity, the particular purpose having failed. It seems, however, to have escaped observation, that, as no mortgage was made, the use resulted to the husband, and consequently the fine was no more a bar at law than in equity.[2]

4. In Naylor *v.* Baldwin,[3] Richard Baldwin made a mortgage by demise to one Tirril, for securing £400 lent by Tirril, and to confirm the mortgage, Baldwin and his wife acknowledged a fine to Tirril. On a bill in equity for divers matters, the court is reported to have said: "As for Mrs. Baldwin's dower, unless she have barred herself totally by levying the fine, the court makes no order therein at present, but declared that if she levied the fine only to secure the lease, [mortgage,] no debt could bar her except Tirril's debt on the lease." It is impossible to deduce any satisfactory result from a case so vaguely reported. It does not even appear whether the fine was or was not an absolute bar at law, but the concluding observation of the court certainly seems to address itself more to the *intention* than to the technical operation of the fine.

5. In the case of Jackson *v.* Parker,[4] Sir Thomas Sewell laid hold of the circumstance of the equity of redemption being limited to the

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[1] And see S. C. cited Pr. Ch. 34, as Mrs. Danby's case.

[2] Park, Dow. 207.

[3] Naylor *v.* Baldwin, 1 Ch. Rep. 180, (15 Car. I.)

[4] Jackson *v.* Parker, Ambl. 687.

husband and wife jointly, to infer an intention that the wife should, in equity, retain her right to dower, subject to the mortgage debt. In that case, John Jackson, tenant in tail of the lands in question, made a mortgage by lease and release and fine, in which his wife joined, to Frances Stubbs, which contained a proviso that if the said John Jackson *and* Esther his wife, their heirs, executors, administrators or assigns should pay the mortgage money and interest, then Frances Stubbs, her heirs or assigns, should reconvey the premises to the said John Jackson *and Esther his wife*, their heirs or assigns; and there was a clause at the end of the deed which declared the uses of the fine to be (subject to payment of £300 and interest) to John Jackson, his heirs and assigns. Upon a question as to what interest the wife took in the equity of redemption on this mortgage, Sir Thomas Sewell was of opinion that, notwithstanding the language of the proviso, there was no room to presume any contract between the husband and wife, by which the latter was to take a joint interest in the equity of redemption in lieu of her dower, but that if it had been so it would have been recited in the deed. But he added, "the wife had a right to redeem, and if she had redeemed, a court of equity would not have taken the estate from her but upon the terms of allowing her dower."[1]

6. In the previous case of Dolin *v.* Coltman,[2] which was not adverted to in the argument of Jackson *v.* Parker, this doctrine seems to have been carried to a still greater length. In that case there was an express agreement that the wife should have the equity of redemption, but that agreement failing upon a special ground, it was held that she should be restored to her dower. The case is thus stated: "The wife joins with her husband in a mortgage, and levies a fine to the intent to bar her dower, and in consideration thereof the husband agrees the wife shall have the redemption of the mortgage; and the husband afterwards mortgages this estate twice more. The court took this agreement to be fraudulent as against the subsequent mortgagees, so far as to entitle the wife to the whole equity of redemption; but in regard the wife, in confidence of this agreement had levied the fine, and thereby barred her dower, and the husband and wife being both living, the court decreed that after the husband's decease, the wife, in case she should happen to survive him, should enjoy her dower."

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[1] See, also, Southcoat *v.* Manory, Cro. Eliz. 744.

[2] Dolin *v.* Coltman, 1 Vern. 294, (in 1684.)

7. The foregoing cases appear to have been regarded as establishing the doctrine that where a married woman joined in a fine of her husband's estate to a mortgagee in fee, and the equity of redemption was in terms limited to the wife, if this limitation failed of effect as a settlement of the equity of redemption, either by reason that the deed furnished no evidence of a contract between the husband and wife for a transfer thereof to her,[1] or by reason of a third person subsequently obtaining a legal priority against her as a volunteer, a court of equity would take advantage of the right of redemption limited to her, to restore her to her dower.[2]

Dower in equities of redemption in the United States.

8. The English rule excluding dower from equities of redemption prevails to but a limited extent in the United States. In many of the States the right to be endowed of this species of estate is secured by express statute, while in others it is recognized and declared in numerous decisions of the courts of last resort.

9. *Massachusetts.*—Some of the earlier Massachusetts cases—in this respect differing from the later decisions—evince a tendency in the minds of the judges of that day to follow the rulings of the English courts, and deny, to some extent, the right of dower in equities of redemption. Thus, in Majury *v.* Putnam,[3] a wife joined with her husband in the execution of a mortgage of his land; subsequently a judgment creditor of the husband sold his equity of redemption on execution; the purchaser paid the mortgage debt, and the mortgage was discharged on the record by the mortgagee; no part of the mortgage debt was ever paid out of the husband's estate; and it was held that the wife of the mortgagor had no right of dower in the land, upon the ground that he had never performed the condition of the mortgage, and the execution gave the judgment creditor his whole estate. So in Popkin *v.* Bumstead,[4] where the wife joined her husband in a mortgage of his lands, and after his death the equity of redemption was sold by his administrator, and the grantee of the purchaser paid the mortgage debt, and procured the mortgage to be

[1] Upon this point, see Innes *v.* Jackson, 16 Ves. 356.

[2] Park, Dow. 207–11; Ibid. 351. See, also, pp. 196, 197.

[3] Majury *v* Putnam, 4 Dane's Abr. 183, 676, (decided in 1793.) See Story's Pleadings, 359, for the form of the plea in this case.

[4] Popkin *v.* Bumstead, 8 Mass. 491.

discharged upon the record, it was held that the widow of the mortgagor was barred of her dower. The court said: "It has been contended for the demandant, upon the facts exhibited in the pleadings in this case, that her title to dower has revived, and is as if she had never released it in the deed of mortgage. It would be singular, if, when the tenant had paid the money due on the mortgage, and supposed that he had thus perfected his estate by extinguishing the only incumbrance he knew to exist upon it, he should, by that act, revive the claim of the demandant which she had before solemnly renounced under her hand and seal, and which, as he was under no obligation, it can not be presumed he meant to do. But the facts produce no such absurdity. When the tenant purchased the equity of redemption, it belonged to him to pay the money due on the mortgage, and thus rid his estate of that incumbrance. Having all the equitable interest in himself, when he had paid the money due by the mortgage, the legal estate followed the equitable interest, and he became seized of the whole fee simple. If this were not the plain legal operation of the transaction, the law would construe the discharge of the mortgage by the mortgagee a release of the legal estate by him to the tenant, who had become lawfully possessed of the equitable interest, and from whom the consideration for that discharge flowed, rather than such a mischief should follow." The result of this decision was simply a denial of the right of the widow to be endowed of the equity of redemption. The purchaser from the administrator of the husband stood in no better position than would have been occupied by a purchaser from the husband himself, and it would seem that the refusal to grant dower in a case of this description was equivalent to holding that equities of redemption were not subject to that estate. The fact that the purchaser had redeemed the lands might have raised a question as to the extent to which the widow should be endowed; or whether she was not called upon to contribute to the payment of the mortgage debt, but it could hardly affect the principal question, as to the right to dower itself.[1]

10. In Bird *v.* Gardner,[2] which was also a proceeding for dower, a disinclination to depart from English precedents was again manifested. The material facts of the case are thus stated by the court: "The demandant's husband, Benjamin Bird, in his lifetime purchased the premises of which dower is demanded, from John

[1] See post, ch. 24.

[2] Bird *v.* Gardner, 10 Mass. 364.

Moies. They were then incumbered with a mortgage which Moies had made to John Hawes, and which he had assigned to Gardner, the tenant. After Bird became the owner subject to that mortgage, he conveyed the same premises in mortgage to the tenant. The first mortgage remains unpaid, and the tenant has, therefore, the legal title as it was conveyed by Moies before Bird had any interest in the premises." Upon this state of facts the court held the demandant not entitled to dower. "It is upon the strength of that title," they added, "by Hawes' assignment vested in the tenant, that he is enabled to resist the demand of dower. The title of Bird, the demandant's husband, was a seizin during the coverture, whereof she was entitled to dower against all other persons than Moies' mortgagee and his assigns. But against them, until the redemption of the mortgage, the demandant's husband had nothing but an equity of redemption; no seizin of any estate of which his wife was dowable. The tenant, therefore, as assignee of the mortgage before the demandant's husband had anything in the premises, must prevail upon this title. *It is well settled that a wife is not dowable of an equity of redemption;* and as a purchaser of the premises subject to Moies' mortgage, Bird had only an equity of redemption." The court suggested, however, that possibly the widow might have some remedy in a court of equity. "The demandant's right of dower," they observed, "might be maintained against the second mortgage, that which her husband in his lifetime made to the tenant, if his title under the first mortgage were removed; and it may be that in a Court of Chancery having a general jurisdiction in matters of equity, the demandant might have relief, and her demand of dower might be enforced by some specific remedy to compel the representatives of the mortgagor to redeem. But whether this can be done in this court, with the very limited jurisdiction indulged to it, which has any resemblance to the powers of a Court of Chancery, is at least questionable."[1]

11. In Bolton *v.* Ballard,[2] the court discussed somewhat at length the question whether a widow is dowable of an equity of redemption, and it was remarked by Parker, C. J., that this question had not at that time received a direct judicial decision in the courts of

[1] At the time Popkin *v.* Bumstead and Bird *v.* Gardner were decided, they were understood to recognize the English doctrine as being in force in Massachusetts. See Stearns' Real Act. [282,] 2d ed.

[2] Bolton *v.* Ballard, 18 Mass. 227.

Massachusetts. "There are strong reasons," he observed, "in favor of dower under such circumstances; and by the common law, which, in this regard is founded in public policy as well as upon a due regard to the situation of widows, dower is a favored estate. Although between mortgagor and mortgagee, the latter is considered as having the whole estate, defeasible only by a performance of the condition; so that no right can be set up against him by the mortgagor or any person claiming under him; yet as to all other persons, the mortgagor remains the lawful proprietor, and may maintain his right and possession, by any action proper for such purpose, in as ample manner as if he had never conveyed, until the mortgage is foreclosed, or actual possession taken by the mortgagee. There seems to be no reason then, why the wife should not be endowed, as long as her claim will not interfere with the rights of the mortgagee. For the husband was seized in fact after the execution of the mortgage, against all but him to whom he had thus conveyed; and if it should be for the interest of the wife, as in some cases it may be, to redeem the estate, there can be no good reason why she should not enjoy an estate, which, but for an incumbrance which she has removed, would always have been subject to her claim." The case, however, was eventually determined upon other grounds.

12. In Snow *v.* Stevens,[1] it was distinctly determined that a widow is dowable of an equity of redemption as against all persons but the mortgagee and those claiming under him. "The general position that a widow is not dowable of an equity of redemption," said Parker, C. J., "we think is not true, in the extent contended for by the counsel for the tenant. No case has yet been decided upon that principle. In the cases cited, (referring to the previous decisions,) the doctrine goes no further than that the widow of him who was seized only of a right to redeem, should not have dower against the mortgagee. To this effect is the case of Bird *v.* Gardner which is principally relied upon; in which, although there are some general expressions which go further than the case required; yet the decision was only that the claim of dower could not be maintained against the mortgagee and his assigns." This case was approved in Barker *v.* Parker,[2] where the right of dower in equities of redemption was explicitly declared. "If a wife should die seized of such an estate," the court remarked, "it would be such a seizin and

[1] Snow *v.* Stevens, 15 Mass. 278.

[2] Barker *v.* Parker, 17 Mass. 564.

estate as would entitle her husband to be a tenant by the curtesy; and when the husband has been seized of such an estate during the coverture, his widow is dowable, and she would have a right to redeem the same."

13. In subsequent cases this doctrine was treated as clearly and authoritatively settled. Thus, in Peabody *v.* Patten,[1] Wilde, J., said: "If a widow be dowable of an equity, as was determined in the case of Snow *v.* Stevens, 15 Mass. R. 278, it follows conclusively that she is entitled to redeem the mortgage." And in Gibson *v.* Crehore,[2] this principle was again enunciated, and the right of the widow to redeem, even as against a mortgagee, expressly adjudged. "That the widow of a mortgagor is entitled to redeem the mortgage," said the same judge above quoted, "is a necessary inference from the doctrine repeatedly laid down as the law of Massachusetts, that a widow is dowable of an equity. It is a familiar principle in courts of equity that every person interested in an estate mortgaged, is entitled to redeem; and this principle is confirmed, if it requires confirmation, by St. 1798, c. 77, by which it is enacted, 'that the mortgagor or vendor or other persons lawfully claiming under them, shall have right to redeem.' If, therefore, a widow can lawfully claim under her husband, of which there can be no question, she has a right to redeem by the express words of the statute." This ruling was followed in other cases, and eventually became the settled law of the State.[3]

14. The right of dower in equities of redemption in Massachusetts is now secured by statute in the following terms:—

> If, upon a mortgage made by a husband, his wife has released her right of dower; or if the husband is seized of land subject to a mortgage which is valid and effectual as against his wife, she shall, nevertheless, be entitled to dower in the mortgaged premises, as against every person except the mortgagee and those claiming under him.[4]

15. *New York.*—In this State the doctrine that equities of redemption are subject to dower, has long been well established, not

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[1] Peabody *v.* Patten, 2 Pick. 517, 519.

[2] Gibson *v.* Crehore, 5 Pick. 146; S. C. 8 Pick. 475.

[3] Walker *v.* Griswold, 6 Pick. 416; Eaton *v.* Simonds, 14 Pick. 98; Jennison *v.* Hapgood, Ibid. 345; Van Vronker *v.* Eastman, 7 Met. 157; Messiter *v.* Wright, 16 Pick. 151. And see Lund *v.* Woods, 11 Met. 566; Niles *v.* Nye, 13 Met. 135; Henry's case, 4 Cush. 257; Newton *v.* Cook, 4 Gray, 46; Pynchon *v.* Lester, 6 Gray, 314; Rand's note, Sheafe *v.* O'Neil, 9 Mass. 13.

[4] Gen. Stat. Mass. (1860,) p. 468, ch. 90, § 2; Rev. Stat. 1836, p. 409, § 2.

only by judicial decision, but by legislative enactment. Chancellor Kent thus states the origin of the rule in the courts of New York: "In Waters *v.* Stewart, (1 Caines's Cases in Error, 47,) in which the decree of this court was, in 1804, unanimously affirmed in the Court of Errors, it was established, that an equity of redemption reserved upon a mortgage in fee, might be sold on execution at law against the mortgagor, as *real estate*, so long as the mortgagor was in possession, and there had not been a foreclosure of the mortgage. The purchaser would take as the mortgagor held, subject to the lien and rights of the mortgagee. According to this decision, the mortgagor was regarded as seized at law, before foreclosure or entry by the mortgagee. In pursuance of this decision, it was decided by the Supreme Court, in 1809, in Jackson *v.* Willard, (4 John. Rep. 41,) that the interest of the mortgagee in the mortgaged premises, before foreclosure or entry by him, was not the subject of sale on execution at law as real estate. The one decision was a necessary consequence of the doctrine in the other. This doctrine was first applied in the case of Hitchcock *v.* Harrington, in 1810, (6 Johns. Rep. 290,) to the case of dower."[1] The following are the leading statutory provisions upon the subject:—

Sec. 4. Where a person seized of an estate of inheritance in lands, shall have executed a mortgage of such estate before marriage, his widow shall, nevertheless, be entitled to dower out of the lands mortgaged, as against every person except the mortgagee, and those claiming under him.

Sec. 5. Where a husband shall purchase lands during coverture, and shall, at the same time, mortgage his estate in such lands to secure the payment of the purchase money, his widow shall not be entitled to dower out of such lands as against the mortgagee, or those claiming under him, although she shall not have united in such mortgage, but she shall be entitled to her dower as against all other persons.[2]

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[1] Titus *v.* Neilson, 5 John. Ch. 452, 455.

[2] 1 N. Y. Rev. Stat. 1st ed. pp. 740, 741, §§ 4, 5; 3 Rev. Stat. N. Y. 5th ed. p. 81, §§ 4, 5. Reference may also be had to the following adjudged cases: Coates *v.* Cheever, 1 Cow. 460; Jackson *v.* Dewitt, 6 Cow. 316; Stow *v.* Tifft, 15 John. 458; Coles *v.* Coles, 15 John. 319; Collins *v.* Torry, 7 John. 278; Hitchcock *v.* Harrington, 6 John. 290; Van Duyne *v.* Thayre, 14 Wend. 233; S. C. 19 Wend. 162; Wheeler *v.* Morris, 2 Bosw. 524; Smith *v.* Jackson, 2 Edw. Ch. 28; Frost *v.* Peacock, 4 Edw. Ch. 678; Titus *v.* Neilson, 5 John. Ch. 452; Hawley *v.* Bradford, 9 Paige, 200; Tabele *v.* Tabele, 1 John. Ch. 45; Evertson *v.* Tappen, 5 John. Ch. 497; Swaine *v.* Perine, Ibid. 482; Bell *v.* Mayor of N. Y. 10 Paige, 49; Russell *v.* Austin, 1 Paige, 192; Bank of Ogdensburgh *v.* Arnold, 5 Paige, 38; Hawley *v.* James, Ibid. 318; House *v.* House, 10 Paige, 158; Kittle *v.* Van Dyck, 1 Sandf. Ch. 76; Hoogland *v.*

16. *New Jersey.*—In Montgomery *v.* Bruere,[1] it was determined that the dower law of New Jersey[2] left the right as it stood at common law, altered by the 27th Henry VIII.,[3] and consequently that dower could not be had of equities of redemption. But in the Court of Appeals the judgment in this case was reversed,[4] and it is now well settled in that State, in conformity to the prevailing American doctrine, that a widow is dowable of an equity of redemption, whether the mortgage be made before or after the marriage.[5]

17. *Maryland.*—Under the Maryland statutes of 1715 and 1766, the wife was held not dowable of equities of redemption.[6] But the law was changed in this respect by the act of 1818.[7] It is held, however, that this statute has no application where the mortgage was made previous to its enactment.[8]

18. *Tennessee.*—In McIver *v.* Cherry,[9] it was held that under the act of 1784, equities of redemption were not subject to dower. "By the act of 1784," the court said, "the widow is only dowable of such lands as the husband died seized and possessed of. But he did not die seized of lands which had been conveyed by him to another by a mortgage deed; and therefore the widow is not dowable of such lands." By the acts of 1823 and 1836, however, dower

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Watt, 2 Sandf. Ch. 148; Fitch *v.* Cotheal, Ibid. 29; Church *v.* Church, 3 Sandf. Ch. 434; Cunningham *v.* Knight, 1 Barb. 399; Denton *v.* Nanny, 8 Barb. 618; Runyan *v.* Stewart, 12 Barb. 537; Vartie *v.* Underwood, 18 Barb. 562; Mills *v.* Van Voorhis, 23 Barb. 125; S. C. 6 Smith, (20 N. Y.) 412; Cooper *v.* Whitney, 3 Hill, 95; Lawrence *v.* Miller, 1 Sandf. S. C. R. 516; S. C. 2 Comst. 245. See, also, 4 Kent, 46.

[1] Montgomery *v.* Bruere, 1 South. 260, Southard, J., dissenting. See ante, ch. 19, § 22.

[2] Paterson, 348, § 1; Laws of N. J. by Justice, 397, § 1; Statutes of N. J. by Phillips & Boswell, p. 71, § 1; Nixon's Dig. p. 209, § 1.

[3] See ante, ch. 19, § 22.

[4] Montgomery *v.* Bruere, 2 South. 865.

[5] Woodhull *v.* Reid, 1 Harr. 128; Yeo *v.* Mercereau, 3 Harr. 387; Hartshorne *v.* Hartshorne, 1 Green's Ch. 349; Thompson *v.* Boyd, 1 Zab. 58; S. C. 2 Zab. 543; Hinchman *v.* Stiles, 1 Stockt. Ch. 361; Ibid. 454; Furman *v.* Clark, 3 Stockt. Ch. 135.

[6] Stelle *v.* Carroll, 12 Peters, 201; Miller *v.* Stump, 3 Gill, 304; Hopkins *v.* Frey, 2 Gill, 359. See, also, McCauley *v.* Grimes, 2 Gill & John. 318; Chase's case, 1 Bland, 206; Mayburry *v.* Brien, 15 Pet. 21.

[7] Act of 1818, ch. 193, § 10; 1 Dorsey, p. 701; 1 Md. Code, p. 325, § 5; Hopkins *v.* Frey, 2 Gill, 359; Miller *v.* Stump, 3 Gill, 304; Mantz *v.* Buchanan, 1 Md. Ch. Decis. 202; Chew *v.* Farmers' Bank, 9 Gill, 361.

[8] Hopkins *v.* Frey, 2 Gill, 359; Mayburry *v.* Brien, 15 Pet. 38.

[9] McIver *v.* Cherry, 8 Humph. 718. See ante, ch. 2, § 16.

was given in all equitable inheritable estates;[1] and the present Code of Tennessee expressly extends the right to equities of redemption.[2]

19. The statute of *Maine*[3] is in almost the same language as that of Massachusetts. In *Illinois*,[4] *Arkansas*,[5] *Vermont*,[6] *Wisconsin*,[7] *Mississippi*,[8] *Michigan*,[9] *Indiana*,[10] *Minnesota*,[11] and the *District of Columbia*,[12] similar enactments are in force. In *Ohio*[13] dower is given by statute in all equitable estates, including equities of redemption. In *Kentucky*,[14] also, the right is recognized by statute, and is well settled by the adjudged cases.

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[1] Act of 1823, ch. 87; Act of 1836, p. 265; Caruth. & Nich. p. 265, § 4. And see Lewis *v.* James, 8 Humph. 537.

[2] Code Tenn. (1858,) p. 478, § 2399.

[3] Rev. Stat. Maine, 1840–41, p. 393, ch. 95, tit. 7, § 15; Rev. Stat. 1857, p. 606, ch. 103, § 14. See, also, the following cases to the same effect: Nason *v.* Allen, 6 Greenl. 243; Smith *v.* Eustis, 7 Greenl. 41; Carll *v.* Butman, Ibid. 102; Hobbs *v.* Harvey, 4 Shep. 80; Campbell *v.* Knights, 11 Shep. 332; Gage *v.* Ward, 12 Shep. 101; Gammon *v.* Freeman, 31 Maine, 243; Littlefield *v.* Crocker, 30 Maine, 192; Manning *v.* Laboree, 33 Maine, 343; Simonton *v.* Gray, 34 Maine, 50; Smith *v.* Stanley, 37 Maine, 11; Young *v.* Tarbell, 37 Maine, 509; Grant *v.* Dodge, 43 Maine, 489; Wilkins *v.* French, 20 Maine, 111; Moore *v.* Rollins, 45 Maine, 493; Barbour *v.* Barbour, 46 Maine, 9.

[4] Act of March 3d, 1845, 1 Purple's Dig. 494, ch. 2, Dower; 1 Stat. Ill. (1858,) p. 151, §§ 3, 4, 5; Sisk *v.* Smith, 1 Gilm. 506; Blain *v.* Harrison, 11 Ill. 384; Gold *v.* Ryan, 14 Ill. 53.

[5] Ark. Rev. Stat. 337, §§ 4, 5, 6; Dig. Stat. Ark. (1848,) p. 445; Dig. Stat. Ark. (1858,) p. 451.

[6] Verm. Rev. Stat. 289, §§ 2, 3, 4; Comp. Stat. Verm. p. 362, §§ 2, 3, 4; Danforth *v.* Smith, 23 Verm. 247.

[7] Wis. Rev. Stat. 333, §§ 3–6; Rev. 1858, p. 546, §§ 3–6.

[8] Hutch. Missis. Code, 622, § 7; Rev. Code, 1857, p. 468; Whitehead *v.* Middleton, 2 How. Missis. 692; Wooldridge *v.* Wilkins, 3 How. Miss. 360; Rutherford *v.* Munce, Walker, 370.

[9] 2 Comp. Laws Mich. 1857, p. 851, ch. 89, §§ 3, 4, 5, 6; Snyder *v.* Snyder, 6 Mich. 470.

[10] 1 Rev. Stat. Ind. 1852, p. 253, § 31; McMahan *v.* Kimball, 3 Blackf. 1; Nottingham *v.* Calvert, 1 Smith, 399; S. C. 1 Carter, 527; Watson *v.* Clendenin, 6 Blackf. 477; Taylor *v.* McCrackin, 2 Blackf. 260.

[11] Stat. Minn. Rev. 1858, p. 407, §§ 3, 4.

[12] Rev. Code Dist. Col. 1857, p. 185, § 41; pp. 199, 200, §§ 3, 4; p. 301, § 17. Before the passage of this statute, it was held that in that part of the District of Columbia which was formed from Maryland the common law prevailed, and that dower could not be had of an equity of redemption. Stelle *v.* Carroll, 12 Pet. 201.

[13] Rev. Stat. 1854, p. 329, § 1; 1 Swan & Critchf. p. 516, § 1; Rands *v.* Kendall, 15 Ohio, 671; Taylor *v.* Fowler, 18 Ohio, 567; Carter *v.* Goodin, 3 Ohio State, 75; Davenport *v.* Sovil, 6 Ohio State, 459.

[14] Ky. Rev. Stat. 393, § 6; Stanton's Rev. vol. ii. p. 26, § 6; McClure *v.* Harris,

20. Dower is also allowed in equities of redemption in *Pennsylvania*,[1] *Connecticut*,[2] *South Carolina*,[3] *Alabama*,[4] *Virginia*,[5] *Rhode Island*,[6] *New Hampshire*,[7] *North Carolina*,[8] *Missouri*,[9] *Kansas*,[10] *Oregon*,[11] *Iowa*,[12] and *Georgia*.[13]

Mortgages for years.

21. Although by the common law dower was not allowed in the equity of redemption of a mortgage in fee, yet a different rule prevailed with respect to mortgages for years. Where a mortgage was for years only, it was held there was a *legal* reversion to which the equity of redemption was knit, and that of this legal reversion the widow was dowable. And as it is a doctrine of courts of equity that every person having an interest in the reversion, shall have a corresponding interest in the equity of redemption, it resulted that the widow of the mortgagor in such case was entitled to redeem.[14] The

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12 B. Mon. 261; Tevis *v.* Steele, 4 Mon. 339; Brewer *v.* Van Arsdale, 6 Dana, 204; Willett *v.* Beatty, 12 B. Mon. 172; Harrow *v.* Johnson, 3 Met. Ky. R. 578.

[1] Dubs *v.* Dubs, 7 Casey, 149; Reed *v.* Morrison, 12 S. & R. 18. And see Shoemaker *v.* Walker, 2 S. & R. 554.

[2] Fish *v.* Fish, 1 Conn. 559.

[3] Brown *v.* Duncan, 4 McCord, 346; Stoppelbein *v.* Shulte, 1 Hill, S. C. 200; Keith *v.* Trapier, 1 Bailey's Ch. 63; Davidson *v.* Graves, Ibid. 268; S. C. Riley, 246; Henegan *v.* Harllee, 10 Rich. Eq. 285; Keckley *v.* Keckley, 2 Hill, S. C. Ch. 250. But before the Stat. of 1791, dower in equities of redemption was not allowed in this State. Verree *v.* Verree, 2 Brevard, 211.

[4] Clay's Dig. p. 157, § 36; Fry *v.* Merch. Ins. Co., 15 Ala. 810; Eslava *v.* Lepretre, 21 Ala. 504; Cheek *v.* Waldrum, 25 Ala. 152.

[5] Code of Va. 1849, § 1; Heth *v.* Cocke, 1 Rand. 344; Wheatley *v.* Calhoun, 12 Leigh, 264; Daniel *v.* Leitch, 13 Gratt. 195.

[6] Rev. Stat. R. I. (1857,) p. 503, § 1; Mathewson *v.* Smith, 1 Angell, 22.

[7] Pinkham *v.* Gear, 3 N. H. 163; Moore *v.* Esty, 5 N. H. 479; Cass *v.* Martin, 6 N. H. 25; Robinson *v.* Leavitt, 7 N. H. 98; Bullard *v.* Bowers, 10 N. H. 500; Rossiter *v.* Cossit, 15 N. H. 38; Clough *v.* Elliott, 3 Foster, 182; Adams *v.* Hill, 9 Foster, 202; Hastings *v.* Stevens, Ibid. 564; Woods *v.* Wallace, 10 Foster, 384; Copp *v.* Hersey, 11 Foster, 317.

[8] 1 Rev. Stat. N. C. (1837,) ch. 12, § 6; Rev. Code N. C. (1855,) ch. 118, § 6; Thompson *v.* Thompson, 1 Jones' Law Rep. 430; Klutts *v.* Klutts, 5 Jones' N. C. Eq. 80; Campbell *v.* Murphy, 2 Jones' N. C. Eq. 357.

[9] Rev. Stat. Misso. (1845,) p. 430, § 1.

[10] Comp. Laws Kansas, (1862,) p. 478, § 1.

[11] Stat. Oregon, (1855,) p. 405, §§ 3–6.

[12] Revision Iowa Laws, (1860,) p. 420, § 2477.

[13] Hart *v.* McCollum, 28 Geo. 478.

[14] Park, Dow. 140.

rule was the same whether the mortgage were executed by the husband before the marriage, or by the husband and wife jointly during the coverture. In either case the privilege of redemption was secured to her by the law.[1]

Estate of the mortgagee not subject to dower.

22. At common law, where the husband was a mortgagee in fee and the condition of the mortgage had become broken, his widow was permitted to recover dower in the courts of *law*, upon proving the legal seizin of her husband under the mortgage deed. And where the estate of the mortgagee had once become absolute by breach of the condition of the mortgage, no subsequent acceptance of the mortgage money, nor reconveyance of the lands by him, would defeat the *legal* title of his widow to dower.[2] Hence it was the ancient practice in mortgaging estates, to unite a third person with the mortgagee, in order that by the joint seizin thus created, the right of dower of the wife of the latter might be intercepted and prevented from attaching upon the estate.[3] But it was only in courts of law, which regarded nothing but the legal estate, that the widow of a mortgagee was held dowable of the lands mortgaged. Courts of equity proceeded upon a different principle, and it was an established doctrine with them, that the equity of a mortgagor extended against persons coming in by every species of title, and consequently that the claims of the widow of a mortgagee were subject to his right of redemption. If, therefore, the mortgage had been redeemed, a court of equity would interpose and restrain her from prosecuting her legal title, even after she had established her right and recovered judgment in a court of law.[4]

23. In this country it is universally considered that the widow of a mortgagee, as such, has no right of dower. And as a mortgage,

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[1] Park, Dow. 350, 351; Palmes *v.* Danby, Prec. Ch. 187; Banks *v.* Sutton, 2 P. Wms. 716; Swain *v.* Perine, 5 John. Ch. 482, 491; Heth *v.* Cocke, 1 Rand. 344, 346; 4 Kent, 46. As to the terms upon which a widow may redeem, see post, chapters 23 and 24.

[2] Park, Dow. 100; 4 Kent, 42; Bro. Dow. pl. 11; Vin. Abr. Dow. (G. 2,) pl. 5; Perk. sec. 392; Co. Litt. 221, a.

[3] Park, Dow. 100; 4 Kent, 42; Cro. Car. 191.

[4] Nash *v.* Preston, Cro. Car. 190; Hard. 466; Arg. Cas. temp. Hardw. 400; Noel *v.* Jevon, Freem. 43; Bevant *v.* Pope, Ibid. 71; Hinton *v.* Hinton, 2 Ves. Sr. 631, per Lord Hardwicke; Park, Dow. 101; 4 Kent, 42, 43; 1 Mad. Ch. 512.

before foreclosure, is regarded by our courts for most purposes as a chattel interest, it is doubted whether the wife of a mortgagee, where the latter dies before foreclosure and entry, though after a technical forfeiture of the mortgage, be now, even at law, entitled to dower in the mortgaged estate.[1] In some of the States this question has been settled by statute. Thus, in New York, it is provided that a widow shall not be endowed of lands conveyed to her husband by way of mortgage, unless he has acquired an absolute estate therein during the marriage.[2] Similar enactments are in force in Illinois,[3] Arkansas,[4] and the District of Columbia.[5] And it is apprehended that this rule is adopted in practice by the courts of most, if not all the States of the Union.[6]

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[1] 4 Kent, 47; Lambert, Dow. 18; 1 Washb. Real Prop. 168, § 15; 4 Dane's Abr. 671; Crittenden *v.* Johnson, 6 Eng. Ark. 94; Foster *v.* Dwinel, 1 Amer. Law Reg. N. S. 604; Cooper *v.* Whitney, 3 Hill, (N. Y.) 94, 100; Reed *v.* Shepley, 6 Vt. 602.

[2] 1 N. Y. Rev. Stat. 741, § 7; 3 Rev. Stat. (5th ed.) p. 32, § 7.

[3] Act of March 3, 1845; Purple's Dig. vol. i. p. 494, Dower, ch. 2, § 6; Stat. Ill. (1858,) p. 152, § 6.

[4] Rev. Stat. Ark. p. 337, § 7; Dig. Stat. Ark. (1858,) p. 452, § 7.

[5] Rev. Code Dist. Col. 1857, p. 200, § 5.

[6] 4 Kent, 47; 1 Washb. Real Prop. p. 163, § 15.

CHAPTER XXIII.

DOWER IN EQUITIES OF REDEMPTION AS AGAINST A MORTGAGEE.

§ 1, 2. Dower before the mortgage becomes absolute.
8–9. Right of the widow to redeem.
10. Extent to which she must redeem.
11, 12. Rule where the husband is grantee of part, only, of the mortgaged premises.
13–21. Rule where the mortgagee has acquired the equity of redemption.
22. Redemption by the widow a condition precedent to dower.
23. Right of a widow who has redeemed, to be reimbursed.
§ 24, 25. Foreclosure and sale after the husband's death.
26–30. Foreclosure and sale during the husband's lifetime.
31–34. Whether the wife must be made a party to such proceeding.
35. Terms upon which she may redeem where she was not made a party.
36. Foreclosure by entry.
37–51. Whether the widow may have the mortgage satisfied from her husband's estate.

Dower before the mortgage becomes absolute.

1. UPON the principle that a mortgagor is to be regarded as the owner of the estate mortgaged, as to all persons, so long as there is no breach of the condition of the mortgage,[1] it was held by Chancellor Walworth in the case of The Bank of Ogdensburgh *v.* Arnold,[2] that the widow of the mortgagor is entitled to dower in the estate, even as against the mortgagee, until such time as he shall have entitled himself to a sale under the mortgage. "In this case," said the chancellor, "Mrs. Arnold joined with her husband in the mortgage; and of course her dower interest in the premises is pledged for the payment of his debt, so far as the same can be reached and applied for that purpose under a decree of foreclosure made in conformity to the statute. Beyond that, the complainants have no equitable claim whatever against her dower interest in the premises, or against her personally. When she joined with her husband in

[1] 1 Hilliard on Mortgages, ch. 8, and cases there cited.
[2] The Bank of Ogdensburgh *v.* Arnold, 5 Paige, 38.

this mortgage, payable at the expiration of ten years, she impliedly reserved to herself the right, in case of his death, to receive so much of the rents of the premises, remaining unsold, from time to time, as belonging to her for her dower. And until the complainants have entitled themselves to a sale of the land pledged by her as a security for the debt of her husband, they have no lien, either at law or in equity, upon that portion of the rents and profits which belonged to her."

2. The case of Bullard *v.* Bowers[1] was decided upon the same principle. In that case the mortgage contained a condition in these words: "The mortgagor shall provide a good and comfortable home in the dwelling-house on the mortgaged premises, and a good bed for the use and benefit of Asahel Bullard during his natural life; and also pay to said Asahel three hundred dollars in money, at such times as he may, by reason of old age, or infirmity, be under the necessity of the same, for his support; which necessity, as well as the amount of payments at different periods, as may be needed, shall be determined by the selectmen of Dublin." The mortgagee never demanded performance of this condition, and it was held that so long as it remained unbroken, the widow of the mortgagor could not be debarred of dower. The court said: "It is apparent, from the nature of the condition, that the mortgagor, or his assigns, was to be suffered to retain possession of the premises until such time as Bullard should make claim for a portion of the dwelling-house and such other beneficial interest as was secured to by him by the mortgage.[2] They are, therefore, entitled to possession until a demand is made by Bullard for the provision secured to him. But if the husband or his representatives have a right to such possession until such contingency occur, the wife has an equal right to her claim of dower until such time. The widow of a mortgagor is entitled to dower of land mortgaged, or the equity of redemption, as against every person excepting the mortgagee or those claiming under him; and whenever the mortgagor, by the tenor of the conveyance is entitled to possession until condition broken, the mortgagor can hold against the mortgagee; and the wife, in such case, is entitled to her dower until the mortgage is enforced."[3]

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[1] Bullard *v.* Bowers, 10 N. H. 500.

[2] Hartshorn *v.* Hubbard, 2 N. H. 453; Dearborn *v.* Dearborn, 9 N. H. 117; Flanders *v.* Lamphear, Ibid. 201.

[3] See, also, Danforth *v.* Smith, 23 Verm. 247, 259.

Right of the widow to redeem.

3. It was settled in the English courts of equity at an early day, that as to all charges and incumbrances upon the husband's lands valid and effectual against the wife, which were in their nature redeemable, there was conferred upon her, by reason of her interest in the premises, a right of redemption.[1] In the English practice this doctrine was regarded as particularly applicable to mortgages for years,[2] mortgages in fee, as we have already seen, having been

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[1] Hitchens *v.* Hitchens, 2 Vern. 403; Duke of Hamilton *v.* Lord Mohun, 1 P. Wms. 118; Banks *v.* Sutton, 2 P. Wms. 716; Palmes *v.* Danby, Prec. Ch. 137; Squire *v.* Compton, 9 Vin. Abr. 227; 2 Eq. Ca. Ab. 387; Park, Dow. 350, 351; 1 Mad. Ch. 522.

[2] Ibid. This was the rule as against the heirs or devisees of the husband, but a purchaser from the husband was permitted to protect his estate, and entirely defeat dower by taking an assignment in the name of trustees, at the time of his purchase, of an outstanding attendant term having priority in date to the inception of the dower right of the wife. As against the purchaser the widow was not permitted to redeem. Thus, in Swannock *v.* Lyford, (Ambler, 6; S. C. under the name of Hill *v.* Adams, 2 Atk. 208; Butl. Co. Litt. 208, a., n. 1,) the complainant's husband being seized of a freehold estate, subject to a term of one thousand years, standing out in a mortgagee by virtue of a mortgage made by his father, conveyed the inheritance, for a valuable consideration, to the defendant, and at the time of the conveyance the defendant took an assignment of the term in mortgage, in the name of trustees, to wait and attend upon the inheritance. The complainant, the widow of the vendor, brought her bill praying to be admitted to redeem the mortgage term, and upon the payment of her proportion of the mortgage money, to be let in to her dower at once, and not be compelled to await the determination of the term, as otherwise she would be entirely defeated of her dower. The purchaser had notice of the rights of the complainant at the time of his purchase, but it was nevertheless held by Lord Chancellor Hardwicke that she could not redeem, and the bill was dismissed. His ruling was principally founded on the case of Bodmin *v.* Vandebendy, (1 Vern. 179, 356; 2 Ch. Cas. 172; Prec. Ch. 65; Freem. 211; Show, P. C. 69.) This doctrine became settled law in England, (Wynn *v.* Williams, 5 Ves. Jr. 130; Maundrell *v* Maundrell, 7 Ves. Jr. 567; 10 Ves. Jr. 246; Simpson *v.* Gutteridge, 1 Madd. 618; Mole *v.* Smith, 1 Jac. & Walk. 665; 1 Jac. 490;) and was commonly resorted to by conveyancers as a means of protecting purchasers against incumbrances and defects of title. (8 Sugden, Vendors, 68; Park, Dow. 371–93; 2 Greenl. Cruise, *179; Williams, Real Prop. 338–45; 4 Kent, 87–93; 1 Washb. Real Prop. 311–13.) And it was also extended in favor of mortgagees of the husband where the wife had not joined, and they were thereby enabled to protect the mortgaged premises against dower. (Wynn *v.* Williams, 5 Ves. Jr. 130; Park, Dow. 385.) This branch of the Real Property Law of England abounds in complications; but the rule formerly prevailing has been greatly modified by recent statute. (8 & 9 Vict. ch. 112, § 2. See Williams, Real Prop. 346; 4 Kent, 9th ed. 93, note; 1 Washb. Real Prop. 312.) In an early case decided in Virginia, (Williamson *v.* Gordon, 5 Munf. 257,) a purchaser who had satisfied an outstanding trust was permitted to avail himself of it in equity; but it

deemed not subject to dower.[1] But when, in the United States, the right of the widow to be endowed was extended to equities of redemption of mortgages in fee, it followed as an incident thereof that she was entitled to redeem. And accordingly it is the general, if not the universal American doctrine, that the widow may redeem the husband's lands from an existing incumbrance, and thus entitle herself to dower even as against the mortgagee.

4. In Bird *v.* Gardner,[2] this point does not appear to have been well considered by the court. The case was a proceeding at law for dower by the widow of the purchaser of an equity of redemption, against the assignee of the mortgage. The court determined that as against the assignee, until redemption of the mortgage, the husband of the demandant had no seizin of any estate of which she was dowable. It was said, however, that if the mortgage were removed, her right could be maintained; and it was intimated that her remedy, if any she had, was in chancery by a proceeding to compel the representatives of her husband to redeem; but no reference was made to the question whether she might exercise the privilege of redemption in her own right. But in Bolton *v.* Ballard,[3] Parker, C. J., in a general discussion of the right of dower in mortgaged estates made these observations: "If it should be for the interest of the wife, as in some cases it may be, to redeem the estate, there can be no good reason why she should not enjoy an estate, which, but for an incumbrance which she has removed, would always have been subject to her claim." And the right of the widow to redeem was declared in express terms in Snow *v.* Stevens,[4] and affirmed as an established principle in Peabody *v.* Patten,[5] Gibson *v.* Crehore,[6] and in several other Massachusetts cases.[7]

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is believed that this feature of the English laws has not been adopted in this country. 4 Kent, 9th ed. 93; 1 Washb. Real Prop. 312, 313, and the cases and statutes referred to in the text of this chapter. See, also, post, chap. 24.

[1] Ante, ch. 22; Park, Dow. 350.

[2] Bird *v.* Gardner, 10 Mass. 364.

[3] Bolton *v.* Ballard, 13 Mass. 227.

[4] Snow *v.* Stevens, 15 Mass. 278.

[5] Peabody *v.* Patten, 2 Pick. 517, 519.

[6] Gibson *v.* Crehore, 5 Pick. 146; S. C. 3 Pick. 475.

[7] Walker *v.* Griswold, 6 Pick. 416; Eaton *v.* Simonds, 14 Pick. 98; Messiter *v.* Wright, 16 Pick. 151, 153; Van Vronker *v.* Eastman, 7 Met. 157; Lund *v.* Woods, 11 Met. 566; Draper *v.* Baker, 12 Cush. 288; McCabe *v.* Bellows, 7 Gray, 148; 1 Allen, 269.

5. This principle has been recognized and applied in the courts of most of the United States.[1] The general doctrine appears to be well stated in Wheeler *v.* Morris, where the court say that the widow of a mortgagor "is directly and immediately interested in the payment of the mortgage debt; that so long as the title of the mortgagee has not been made absolute by a foreclosure which is effectual to cut off that equity, she is entitled to pay the debt, and take dower in the premises; that although she can not set up a claim to dower as against the mortgagee, to impair or defeat the mortgage, she may avail herself of the right which she has, even at law, as against all others, in any mode not inconsistent with, but in affirmance of, the mortgagee's interest, and in equity may seek a redemption."[2]

6. In this connection it may be proper to observe that the right of the widow to redeem, exists, not only where the husband was seized of the lands prior to the date of the mortgage, but also in those cases where the conveyance to the husband, and the reconveyance by way of mortgage to the grantor to secure the unpaid purchase money, are concurrent acts. A simultaneous conveyance and reconveyance of this character are usually said to give to the husband an instantaneous seizin only, and not such an interest in the premises as will entitle his widow to dower;[3] but this doctrine is to be understood as having reference solely to the rights of the mortgagee and those claiming under him. As to all other persons, the mortgagor is regarded as the real owner of the lands, and his wife as being entitled to dower. And as against the mortgagee, the right of redemption exists precisely as where the mortgage is given to secure the payment of an ordinary debt.

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[1] 4 Kent, 162; Heth *v.* Cooke, 1 Rand. 344, 348; Van Duyne *v.* Thayre, 14 Wend. 233; S. C. 19 Wend. 162; Bell *v.* Mayor of New York, 10 Paige, 49; Wheeler *v.* Morris, 2 Bosw. S. C. 524; Denton *v.* Nanny, 8 Barb. 618; Mills *v.* Van Voorhis, 23 Barb. 125; Cass *v.* Martin, 6 N. H 25, 26; Rossiter *v.* Cossit, 15 N. H. 38, 43; Hastings *v.* Stevens, 9 Foster, 564; Adams *v.* Hill, Ibid. 202; Furman *v.* Clark, 3 Stockt. Ch. 135; Nottingham *v.* Calvert, 1 Carter's Ind. R. 527, 529; Watson *v.* Clendenin, 6 Blackf. 477; Harrow *v.* Johnson, 3 Met. Ky. R. 578; Reed *v.* Morrison, 12 S. & R. 18, 21; Mathewson *v.* Smith, 1 Angell, 22; Smith *v.* Eustis, 7 Greenl. 41; Carll *v.* Butman, Ibid. 102; Wilkins *v.* French, 20 Maine, 111; Campbell *v.* Knights, 24 Maine, 332; Gage *v.* Ward, 25 Maine, 101, 103; Simonton *v.* Gray, 34 Maine, 50; Danforth *v.* Smith, 23 Vermont, 247; Campbell *v.* Murphy, 2 Jones' N. C. Eq. 357; Daniel *v.* Leitch, 13 Gratt. 195; Mantz *v.* Buchanan, 1 Md. Ch. Decis. 202; Fry *v.* Merchant's Ins. Co., 15 Ala. 810; Wheatley *v.* Calhoun, 12 Leigh, 264; Stoppelbein *v.* Shulte, 1 Hill, S. C. 200; Henegan *v.* Harllee, 10 Rich. Eq. 285; Snyder *v.* Snyder, 6 Mich. 470.

[2] Wheeler *v.* Morris, 2 Bosw. 524, 533.

[3] Ante, ch. 12, §§ 39–46.

7. In Holbrook *v.* Finney,[1] where the principle that an instantaneous seizin is insufficient to confer the right of dower, was first applied in Massachusetts, to the case of a simultaneous deed and mortgage, the equity of redemption had actually been foreclosed, and it followed that the right of the widow to redeem was entirely extinguished. This was the case, also, in Clark *v.* Munroe.[2] In Stow *v.* Tifft,[3] the premises were sold under a power contained in the mortgage. In Jackson *v.* Dewitt,[4] the mortgage had been executed before the marriage, and after the marriage the husband had released the equity of redemption to the mortgagee. These are the early leading cases in which the point was determined, and in none of them did the question arise as to the widow's right of redemption. But in Bell *v.* Mayor of New York,[5] in which the chancellor went very fully into the whole subject of the right of dower in equities of redemption, it was expressly decided that the widow was entitled to redeem notwithstanding the deed and mortgage were executed cotemporaneously. "Where a deed is given," he remarked, "and a mortgage upon the premises is executed at the same time, to secure the whole or a part of the unpaid purchase money, it is considered as one transaction only so far as is necessary to protect the rights of the mortgagee."[6] And after an elaborate review of the authorities, the court, in Wheeler *v.* Morris, came to the same conclusion. "Our conviction is," they said, "that the only substantial difference between a mortgage for purchase money, and a mortgage for any other debt, as respects the right of dower, is this: the former does not require execution by the wife to become binding upon her, and superior to her right to dower; the latter does. And in each case there remains vested in the husband an equity of redemption, in which the wife, if she survive the husband, may have dower, and in virtue of which, she is entitled to redeem."[7] The same rule applies where a mortgage for purchase money is executed before the mar-

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[1] Holbrook *v.* Finney, 4 Mass. 566.

[2] Clark *v.* Munroe, 14 Mass. 351.

[3] Stow *v.* Tifft, 15 John. 458.

[4] Jackson *v.* Dewitt, 6 Cow. 316.

[5] Bell *v.* Mayor of New York, 10 Paige, 49. See, also, House *v.* House, Ibid. 158, 164.

[6] In Nottingham *v.* Calvert, 1 Carter's Ind. R. 527, the doctrine that a widow is not dowable as against a mortgage given for the purchase money, was applied, but in that case, also, there had been a foreclosure.

[7] Wheeler *v.* Morris, 2 Bosw. 524.

riage. The contrary was held in Cunningham *v.* Knight,[1] but this case was overruled in Mills *v.* Van Voorhis.[2]

8. In Maine the rule disallowing dower where the seizin of the husband is instantaneous only, has been the subject of adjudication in several recent cases. In Gammon *v.* Freeman,[3] the deed and mortgage were simultaneous, and the mortgage was subsequently foreclosed. Smith *v.* Stanley[4] was of a similar character. In that case, upon default of the condition of the mortgage, the mortgagee sued out a writ of entry, and obtained possession of the premises. The rule above referred to was applied, and dower denied the widow of the mortgagor in each of these cases. This doctrine was also declared to be law in Grant *v.* Dodge.[5] But in neither of these cases—although the general doctrine is stated rather strongly against the widow in all of them—is there anything to be found impugning her right to redeem. On the other hand, her right in this particular is distinctly recognized in several of the earlier cases. Thus, in Smith *v.* Eustis,[6] the court say of the title of the demandant's husband that he "had only an instantaneous seizin of the legal estate," and they remark that a seizin of this character, "according to the decision of Holbrook *v.* Finney, 4 Mass. 561, and Stow *v.* Tifft, 15 John. 458, does not entitle a woman to dower; and so the law seems to have been understood and administered in Massachusetts until the year 1816, when it was decided in the case of Bolton *v.* Ballard, 13 Mass. 227, that a woman was dowable of an equity of redemption. Since which time," they add, "the same principle has been recognized, and is now established law of that commonwealth." In conclusion, they approve and follow the ruling of the Massachusetts courts. This decision is supported by Wilkins *v.* French,[7] and by the late case of Young *v.* Tarbell.[8]

9. In Bullard *v.* Bowers,[9] decided in New Hampshire, the right of a widow to redeem lands mortgaged concurrently with the conveyance, was treated as a settled point. So in Adams *v.* Hill.[10] And

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[1] Cunningham *v.* Knight, 1 Barb. 399.

[2] Mills *v.* Van Voorhis, 23 Barb. 125; affirmed in the Court of Appeals, 20 N. Y. (6 Smith,) 412, 416; Cunningham *v.* Knight was also questioned in Blydenburgh *v.* Northrop, 13 How. Pr. R. 289.

[3] Gammon *v.* Freeman, 31 Maine, 243.

[4] Smith *v.* Stanley, 37 Maine, 11.

[5] Grant *v.* Dodge, 43 Maine, 489.

[6] Smith *v.* Eustis, 7 Greenl. 41.

[7] Wilkins *v.* French, 20 Maine, 111.

[8] Young *v.* Tarbell, 37 Maine, 509.

[9] Bullard *v.* Bowers, 10 N. H. 500.

[10] Adams *v.* Hill, 9 Foster, 202.

in the Maryland case of Mantz *v.* Buchanan,[1] this doctrine is supported in its fullest extent.

Extent to which the widow must redeem as against a mortgagee.

10. A mortgagee can not be compelled to accept payment of part, only, of his debt and surrender a proportionate interest in the mortgaged estate.[2] If, therefore, a widow would entitle herself to dower as against the mortgagee, she must pay the whole of the mortgage debt, and thus redeem the entire premises. "A mortgagee," said Wilde, J., in Gibson *v.* Crehore,[3] "has an undoubted right to insist on his whole debt. Nor can he be compelled to be redeemed by parcels, for by thus dividing the estate, the income or value of the whole may be reduced. The rule, therefore, is, when several are interested in an equity of redemption, and one only is willing to redeem, he must pay the whole mortgage debt; and the others interested in the equity, who refuse to redeem, are not compellable to contribute; for it would be unreasonable to compel a party to redeem, when, perhaps, it might be for his benefit to suffer the mortgage to be foreclosed. The mortgagee, however, is not to be entangled with any question which may arise between the owners of the equity, in relation to contribution, but has the right to insist on an entire redemption." This principle is stated in substantially the same terms by Walworth, Chancellor, in Bell *v.* The Mayor of New York.[4] "Where the mortgagee insists upon payment of his debt," he there observes, "as a condition upon which the owner of the general or of a particular estate in the mortgaged premises shall be permitted to redeem, I am not aware of any principle upon which this court can be justified in requiring him to relinquish the possession of any part of the mortgaged premises, and to receive payment of a proportion of his debt, which is chargeable on that part of the premises, in periodical payments during the life of the party entitled to redeem."[5]

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[1] Mantz *v.* Buchanan, 1 Md. Ch. Decis. 202.

[2] 4 Kent, 163.

[3] Gibson *v.* Crehore, 5 Pick. 145, 151. See, also, Eaton *v.* Simonds, 14 Pick, 98; Messiter *v.* Wright, 16 Pick. 151, 158; Lund *v.* Woods, 11 Met. 566, 570; Brown *v.* Lapham, 8 Cush. 551, 554; McCabe *v.* Bellows, 7 Gray, 148, accord.

[4] Bell *v.* Mayor of N. Y., 10 Paige, 49, 71. As to the extent to which a widow must contribute as against the holder of an equity of redemption who has redeemed, see post, chap. 24, §§ 26–28.

[5] Accord. Van Duyne *v.* Thayre, 14 Wend. 233, 236; S. C. 19 Wend. 162; Wheeler *v.* Morris, 2 Bosw. 524; Mills *v.* Van Voorhis, 23 Barb. 125.

In New Hampshire,[1] Maine,[2] Rhode Island,[3] Indiana,[4] Maryland,[5] and Virginia,[6] this doctrine has been recognized in numerous decided cases.[7]

Rule where the husband is grantee of part, only, of the mortgaged premises.

11. In Gibson *v.* Crehore,[8] it is said that if "several estates are mortgaged to one mortgagee, and the mortgagor afterwards conveys the estates separately to different persons, although each owner of the separate estates may redeem, yet it can only be allowed by payment of the whole mortgage debt. And the party so redeeming will be entitled to hold over the whole estate mortgaged, until he shall be reimbursed what he has been thus compelled to pay beyond his due proportion." This doctrine appears to have been applied in Mills *v.* Van Voorhis.[9] In that case lands were mortgaged for the purchase money, and afterwards the mortgagor sold portions of the premises to different persons. It was decided that the grantees were seized of the equity of redemption in the portions conveyed to them, and that their wives were respectively entitled to dower out of such portions, subject to the payment of the mortgage. A similar decision was made in Mantz *v.* Buchanan.[10] But in Carll *v.* Butman,[11] the widow of a purchaser of a part of the mortgaged premises was allowed dower upon redeeming a proportionate part of the mortgage debt. In that case, however, the assignee of the mortgage was also the owner of the equity of redemption.

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[1] Rossiter *v.* Cossit, 15 N. H. 38, 43; Hastings *v.* Stevens, 9 Foster, 564.

[2] Campbell *v.* Knights, 24 Maine, 332, 334; Gage *v.* Ward, 25 Maine, 101, 103; Smith *v.* Kelley, 27 Maine, 237.

[3] Mathewson *v.* Smith, 1 Angell, 22, 27.

[4] McMahan *v.* Kimball, 3 Blackf. 1, 12; Watson *v.* Clendenin, 6 Blackf. 477, 478; Nottingham *v.* Calvert, 1 Carter's Ind. R. 527, 529.

[5] Mantz *v.* Buchanan, 1 Md. Ch. Decis. 202; Purdy *v.* Purdy, 3 Md. Ch. Decis. 547.

[6] Wheatley *v.* Calhoun, 12 Leigh, 264; Heth *v.* Cocke, 1 Rand. 344, 346.

[7] See, also, the following English authorities bearing upon the question of the right of the mortgagee to insist upon full payment of the mortgage debt: Palmes *v.* Danby, Prec. Ch. 137; Saville *v.* Saville, 2 Atk. 458; Banks *v.* Sutton, 2 P. Wms. 716; Elwys *v.* Thompson, 9 Mod. 396; 15 Viner, 447; ex parte Carter, Ambler, 733; Powell on Mortg. 392, 708, 709, notes.

[8] Gibson *v.* Crehore, 5 Pick. 146, per Wilde, J.

[9] Mills *v.* Van Voorhis, 23 Barb. 125.

[10] Mantz *v.* Buchanan, 1 Md. Ch. Decis. 202.

[11] Carll *v.* Butman, 7 Greenl. 102.

12. Cases sometimes occur in which a party who has paid off a mortgage may be subrogated to the rights of the mortgagee. Thus, where lands were purchased in common by two vendees, and they jointly executed a mortgage upon the premises to secure a portion of the purchase money, and one of them died, and the survivor paid off the mortgage, it was held that the latter, in equity, was entitled to be subrogated to the rights of the mortgagee, to the extent of a moiety of the mortgage debt, and that such claim by subrogation was paramount to the claim of dower of the widow of the deceased vendee.[1]

Rule where the mortgagee has acquired the equity of redemption.[2]

13. Where the defendant in a proceeding for dower sets up and relies upon a distinct claim, derived either from the mortgagor or the mortgagee, his rights may generally be easily ascertained, and readily determined. But there is a class of cases more difficult of solution, arising where the rights of both mortgagor and mortgagee meet and unite in the same person. To this class belong the cases in which the mortgagee has become the owner of the equity of redemption, and they frequently present for consideration questions of great practical importance.

14. Several cases of this character, involving property interests to a considerable amount, have been determined in the courts of New Jersey. The first of these is Woodhull *v.* Reid.[3] In that case the demandant's husband purchased certain lands subject to an outstanding mortgage; he afterwards failed, and his assignee sold and conveyed the equity of redemption to a third person. After the death of demandant's husband the purchaser from the assignee conveyed the lands to the mortgagee, who subsequently conveyed to the defendant. It was held by the whole court that the demandant was not entitled to dower, upon the ground that in the hands of the mortgagee the equity of redemption became merged and extinguished in the mortgage, and converted into a legal title. The court referred to, but did not determine the question as to her right to dower in equity, upon a bill to redeem *pro tanto*. After this came Thompson *v.* Boyd,[4] in which the ruling in Woodhull *v.* Reid was relied

[1] Wheatley *v.* Calhoun, 12 Leigh, 264. See, also, Pynchon *v.* Lester, 6 Gray, 314.

[2] See ante, § 3, note 2.

[3] Woodhull *v.* Reid, 1 Harr. 128.

[4] Thompson *v.* Boyd, 1 Zab. 58.

upon and followed. In that case lands incumbered by a mortgage were sold at executors' sale, and bid in by the mortgagee. Upon the consummation of the sale the mortgagee released the executors from all claim on the bond and mortgage, acknowledging that he had received the amount due thereon, and paid the balance of the purchase money in cash. But in the instrument of release he declared that with the assent of the executors he retained the mortgage as a muniment of title to the lands purchased. On this state of facts it was contended in behalf of the demandant, (the widow of the person who had owned the equity of redemption,) that the mortgage debt was satisfied and she entitled to dower. And Whitehead, J., was of this opinion, but a majority of the court held otherwise. "Had the executors sold and conveyed the equity of redemption to any other than he who held the mortgage," said Randolph, J., "the seizin of the purchaser would have been simply that of demandant's husband, and of course, dower could not be defeated by the mortgage, whether it was outstanding, paid off, or transferred to the purchaser, but as the sale and conveyance was to the person who held the mortgage, his legal estate under it became perfect, and extinguished the husband's seizin, and the demandant's dower; for although a court of law may discharge a bond, or cause satisfaction to be entered on the judgment thereon, yet the mortgage might be detained as a title or muniment thereof, which might be important beyond the question of dower, and so long as he retained and held under the mortgage, his seizin was paramount to demandant's claim. Whether a court of equity would grant relief to the demandant under the special circumstances of the case it is not necessary to say, but I do not see any way for us, sitting as a court of law, to do so."

15. The case was taken to the Court of Errors and Appeals, where the judgment of the Supreme Court was affirmed. The court said: "The mortgagee holding, as against the mortgagor, the legal title, subject only to the condition or equity of redemption, may unite that equitable interest to his legal title, either by foreclosure or by the voluntary release or conveyance of the mortgagor. Such union of the legal and equitable estate extinguishes, or, as the phrase is, merges the equitable in the legal estate, and the latter becomes absolute. The estate which was before a fee simple, is still the same, but it is relieved of the condition or equity with which it had been previously incumbered. If by foreclosure, the condition is gone for all purposes, and the estate is absolute in the mortgagee.

If by conveyance it is so at law, and if the widow has any right, it is only in equity to redeem *pro tanto*. In such case the mortgagee does not hold under the subsequent conveyance, but under the mortgage, and, the equity of redemption being extinguished, his title is paramount to the dower title of the wife. It is an entirely different case where, the mortgage having been discharged, the tenant can rely only on the title derived from the husband. He who claims under the husband by conveyance during coverture will hold subject to the wife's dower." After noticing some of the views urged by counsel on the argument, the court conclude: "It is difficult to see how the prior or subsequent acquisition of the legal title under the mortgage can affect the doctrine of merger, which is said to be inflexible at law. Merger is said by Mr. Preston to be the conclusion of law upon the union of two estates: Merger, or in other words extinguishment, is the effect, while union is the cause. It takes place when a greater and a less estate coincide and meet in one and the same person, and an instance given is, when tenant for years obtains the fee; so when legal and equitable estates unite, the equitable must merge in the legal. But it is the union of the two estates which is described as causing this result, and which seems to owe nothing to the mere order of acquisition of those estates. There is, however, nothing in the case itself which makes it necessary to decide whether one who holds the equity of redemption by conveyance, mediate or immediate from the husband, can protect himself from dower by the *subsequent* purchase of a prior mortgage. This question, though discussed as part of the general doctrine, is not raised by the case. The present seems to be the plain case of the equity of redemption united by purchase to the prior legal title of the mortgagee, and thus extinguished at law."[1]

16. If there be any doubt or question as to the correctness of the judgment in the foregoing case, it would seem to be respecting the ground upon which it is placed. Where there is a foreclosure and

[1] Thompson *v.* Boyd, 2 Zab. 543. And see opinion of Justice Story in Dexter *v.* Harris, 2 Mason, 531, 539. In Van Duyne *v.* Thayre, 19 Wend. 162, the Supreme Court of New York made a similar decision as to the effect of a release to the mortgagee by the mortgagor of the equity of redemption. The equity was held to be merged or extinguished in the title conveyed by the mortgage. The wife of the mortgagor had not joined in the release, which was executed during coverture, but it was nevertheless held that she had no remedy at *law* against the mortgagee who was in possession under his title, and that her only mode of relief was in *equity* by a bill to redeem. But see the case of Woods *v.* Wallace, post, § 19.

sale of mortgaged premises upon a mortgage valid against the wife, the result is to entirely divest her of all claim upon the lands, and compel her to look to the surplus proceeds of the sale, if any, remaining after satisfying the mortgage debt. In such case, also, the purchaser takes his title discharged from the mortgage incumbrance. The debt is satisfied from the money which he pays for the lands, and the lien of the mortgage is extinguished. His title is derived from the officer who made the sale, and who conveys to him, not the equity of redemption, merely, but the entire fee simple estate. If the mortgagee were the purchaser at such sale, it is supposed he would occupy the same position in this respect as any other purchaser. In a case of this kind, it would scarcely be claimed that the title acquired under the sale merges and becomes lost in the prior legal estate held under the forfeited mortgage, and that the latter constitutes the true subsisting title to the lands. And as the law is understood in many of the States, a sale of the real estate of a decedent for the payment of his debts, by his personal representatives, has the same effect in extinguishing liens upon the lands sold, whether by judgment or mortgage, as a sale in foreclosure; unless, indeed, the proceeding for, and order of sale, be limited to the equity of redemption. And where, by reason of a power contained in the will, the executor is authorized to make sale of lands for the payment of debts without invoking the aid of a probate court, a sale made in virtue of such power would, it is believed, be attended with the same result. The fund produced by the sale would represent the lands sold, and to that the mortgagee or other incumbrancer would be compelled to look for the payment of his debt. For a misapplication of that fund the remedy of the creditor would be upon the official bond of the executor. In Thompson *v.* Boyd, doubts having arisen as to the power conferred by the will, an act of the legislature was passed giving full authority to make the sale for the purpose of satisfying the particular mortgage in question and other debts of the testator. There would seem therefore to be good reason to suppose that the purchaser at such sale, whether he were a third person, or the mortgagee, acquired identically the same title, and the same rights, as against the claim for dower, as if the sale had been made under a decree in foreclosure predicated upon the mortgage. If this be so, it is clear that the widow was not dowable of the *lands*, but of the surplus, only, in the hands of the executors. And it is difficult to understand upon what principle the mortgage was to be treated as

subsisting after the debt it was intended to secure had been paid, or how the title acquired by the sale became merged and extinguished therein.

In the opinion delivered in the Court of Errors and Appeals, however, the court maintained that as the testator had nothing but an equity of redemption in the lands, the executors had no power to dispose of any interest beyond that, and in fact that the purchaser acquired nothing more by the sale. Assuming this to be so, then there was not only no foreclosure of the mortgage, but nothing equivalent thereto; and as the executors could no more deprive the widow of her right to redeem by a sale of the equity of redemption to the mortgagee than by a sale to any third person, it follows that she was as fully invested with that privilege after the sale as before. The right of the widow in this respect, though not expressly decided, appears to be tacitly admitted in the opinions delivered in both courts. And upon a bill to redeem, full payment of the mortgage debt would have been the most that could have been required of her; and had the debt been small as compared with the value of the equity of redemption, the principle adopted by the court would have operated greatly to the disadvantage of the mortgagee.

17. Van Vronker *v.* Eastman[1] was a case in which the assignee of a mortgage purchased in the mortgaged premises on a sale made to satisfy a mechanic's lien. The widow of the mortgagor filed her bill to redeem and for dower. The court held that she should be endowed upon paying her due proportion of the mortgage debt. As to the extent to which she was required to redeem, the court said: "If the plaintiff had an estate in fee in one-third of the mortgaged premises, she would be bound to pay one-third of the mortgage debt and interest. But as she has only a life estate in the dower, the payment of the full third part would be unjust. The value of her life estate is to be adjusted by taking into consideration her age, and the state of her health, and by ascertaining the value of the residue of the estate, including the reversion of her third part; and her proportion of the debt she is bound to pay will be according to the proportional value of her estate and that of the defendant." This case came under review in McCabe *v.* Bellows,[2] in which it was held that in order to entitle herself to dower, as against a mortgagee, the widow must

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[1] Van Vronker *v.* Eastman, 7 Met. 157.

[2] McCabe *v.* Bellows, 7 Gray, 148.

offer to pay the *whole* amount due on the mortgage. "In Van Vronker *v.* Eastman," the court observed, "the question whether the plaintiff should pay the entire sum, or only in proportion to the value of her estate in dower, does not seem to have been raised. The prayer of the bill was that the plaintiff might be at liberty to redeem the estate, or contribute towards the redemption thereof. The question discussed was, whether the plaintiff should also pay her proportion of the amount of an incumbrance created under the lien law, and for which the estate had been sold under the provisions of the statute. The court decided that the widow was not bound to pay any proportion of the lien, but that she should pay towards the mortgage in proportion to the value of the estate. As the mortgagee was the owner also of the equity, he may not have objected to this course, because, if she paid the whole mortgage debt she would hold the mortgage as equitable assignee, beyond her proportion, and the defendant would have again to redeem of her. . . . . There would seem to be a conflict in the doctrine of the case of Van Vronker *v.* Eastman with the prior case of Gibson *v.* Crehore and the subsequent one of Brown *v.* Lapham; but it is reconciled by a careful view of the facts of the cases." In Lund *v.* Woods,[1] the husband of the demandant had conveyed his equity of redemption to the mortgagee without her release of dower. In her bill she prayed that the court would inquire and determine what sum it was just and equitable that she should pay to the defendant in order to be allowed to redeem, so that dower in her right might be set out in one-third part of said premises; and that, upon payment of such sum, if any, dower might be thus set out. The prayer of the bill was granted.

18. In the case of Campbell *v.* Knights,[2] the grantee, upon receiving his deed, mortgaged the premises to the grantors for the purchase money. After the decease of the former, the dower of his widow was regularly assigned in the premises, and the equity of redemption of the deceased was sold by his administrator to the mortgagees, the conveyance to them containing a reservation in these words: "Reserving from this conveyance the widow's dower, which has been assigned and set out heretofore." The question presented was, whether the mortgagees were entitled to recover that portion of the estate thus assigned and reserved as the widow's dower. The court

[1] Lund *v.* Woods, 11 Met. 566.

[2] Campbell *v.* Knights, 24 Maine, 332.

said: "If their mortgage be, therefore, an outstanding and subsisting mortgage upon the estate, they will be entitled to recover, and the widow must redeem it to be restored to her dower. But if by the union of the two titles in the demandants, the incumbrance on the estate was extinguished, they will not be entitled to recover. The general rule is, that the mortgage may be considered as still subsisting, when it is for the interest of the party that it should be, to protect himself against any other charge or incumbrance upon the estate. When, however, it would be inequitable, or contrary to the clear intention of the parties, or conducive to fraud, the mortgage is regarded as extinguished. In this case, as the sale of the equity was made by an administrator, it must be presumed that he conducted legally, and that he advertised and sold the estate subject to the widow's right of dower in the premises. If others than the mortgagees had purchased, they must have paid off the mortgage to have relieved the estate, and they would then have obtained all which they purchased, without obtaining an assignment of the mortgage and claiming a contribution from the widow. The demandants purchased the equity subject to the widow's dower in the estate, and they can not be considered as equitably entitled to stand in a more favorable position than other purchasers would have done. It was obviously the intention of the parties at the time of the sale and conveyance, that the widow should be considered as fully entitled to her dower as it had been assigned; and to consider the mortgage as subsisting for the purpose of defeating that dower, would be alike inequitable and contrary to the intentions of the parties."

19. Woods *v.* Wallace[1] is another case in which the assignee of a mortgage had purchased the equity of redemption from the administrator of the mortgagor. In discussing the right of the widow of the latter to dower, the court went fully into the question as to the extent to which she was compellable to redeem. "Can the widow be permitted to enjoy any interest in the premises, excepting upon the payment by her of the whole Farley mortgage debt to the defendant? Or may she entitle herself to be endowed of any part of the estate upon payment of her fair proportion of the debt, according to her dower interest? The bill and answer show that the defendant set off to the plaintiff an interest in the premises less than one-third part. But we are of the opinion that she was entitled, upon making

[1] Woods *v.* Wallace, 10 Foster's N. H. Rep. 384.

her proper contribution, to a greater share or interest. Upon payment of her proper share of the debt, she was entitled to be let in upon her dower in the same manner in which she would have been entitled if she had never incumbered the estate by the execution of the mortgage. If we look at the exact relation of the several parties to the estate, we think the rights of each will be apparent. The defendant, in the first place, purchased the Farley mortgage, and it was assigned to him upon his paying the amount of it. He subsequently purchased the right which Aaron Woods had at his death to redeem the premises. After the purchase of the equity of redemption, as we conceive, he stood in the same position, and had the same rights which he would have had if he had first purchased the equity of redemption, and afterwards had paid the amount of the mortgage, or had taken an assignment of it. In either case he would be in equity and in law the purchaser and owner of the mortgage by way of redemption. The plaintiff also has the same rights in the estate that she would have had if the purchase of the equity had been made by the defendant in the first instance, and the mortgage afterwards. She has an interest in the estate mortgaged, she having executed a mortgage deed, only, and not an absolute deed to the mortgagee. Having an interest in the premises, she has, like all other parties thus situated, a right to redeem. That is a universal principle. What is she to do to entitle herself to redeem, or how is she to avail herself of her right to redeem? The defendant, when he purchased, and so long as he held the mortgage interest, only, of Farley, was entitled to receive of the plaintiff, or of any one holding the equity of redemption, the entire sum secured by the mortgage. There was no principle of law or equity that could conflict with that right. Upon no ground could the plaintiff, or any other one holding the equity of redemption, redeem, short of a payment of the entire sum secured by the mortgage. But when the defendant purchased the equity, she became entitled, as against him, to be endowed of one-third part of the premises, upon contributing her just proportion of the mortgage debt, according to the value of her interest. We think it would be idle to hold that the defendant was entitled to receive the whole amount of the mortgage before the complainant could be let in upon her dower estate; for if she should so pay the amount of the mortgage, she would clearly be entitled to the whole premises until contribution should be made to her by the defendant. The estate of each in the land was liable for the whole mortgage debt. He could

avail himself of the equity of redemption purchased by him at the administrator's sale, in no other way than by contributing his fair proportion of the mortgage debt. Why, then, should she be driven to the idle ceremony of paying the whole mortgage, thereby giving the defendant the right to regain his interest in the premises by refunding to her his share? Such a course, we think, is not required, nor is it in accordance with well considered decisions in like cases. Perhaps another view of the case may be taken, leading to the same result. The purchase of the interest of Aaron Woods in the estate, that is, of the equity of redemption, may well be considered as an extinguishment of so much of the mortgage debt as shall bear the same proportion to the whole debt secured by the mortgage, as the value of that interest in the premises bears to the whole interest of both the mortgagors—or the whole estate. Certainly that is an equitable view. It is the duty of a purchaser of an equity to redeem from the mortgage. If he holds the mortgage it should be considered as extinguished to that extent. To entitle herself, then, to be endowed, the complainant must pay the balance to the defendant, or offer to do it. This she did offer to do. And so upon paying the same into court, after its amount shall be ascertained by an auditor or master appointed for the purpose, she will be entitled to have her dower set off to her in the premises."[1]

20. In a case in Michigan, the holder of a mortgage given by husband and wife became the owner of the equity of redemption, and afterwards conveyed the land by warranty deed. It was held that as against the grantee, in a suit by the wife for dower after the husband's death, she was entitled to a third of the residue of the whole value of the premises, after deducting the amount of the mortgage. It was further held that where the equity of redemption is conveyed to the assignee of the mortgage under such circumstances, it creates such a merger as to put him in the position of an assignee of the mortgagor, and as satisfying the mortgage under the laws of that State.[2]

21. In South Carolina it is held that dower must be assessed on the actual value of the land, subject, only, to the lien of the mortgage incumbrance. Therefore, where the husband sold to a mort-

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[1] Woods *v.* Wallace, 10 Foster, 384. Compare the opinion in this case with that delivered in Thompson *v.* Boyd, ante, § 15.

[2] Snyder *v.* Snyder, 6 Mich. 470; 2 Comp. Laws Mich. (1857,) § 2777.

gagee to whom the wife had relinquished her dower, and in order to give an unincumbered title it was agreed that the land should be sold under a decree of foreclosure, the mortgagee to bid it off if it did not exceed the stipulated price, and to pay the difference if it sold for less, and the land was sold accordingly, and was bought by the mortgagee for less than the stipulated price, it was held that the dower must be assessed on the price which the mortgagee had agreed to pay, and not on the price for which the land was sold under the decree, the amount of the mortgage debt being first deducted.[1]

Redemption by the widow a condition precedent to dower.

22. Where a mortgage is valid and effectual as against the widow, she must exercise the equitable privilege conferred upon her, and actually redeem the lands before she can have an assignment of her dower. If she fail to redeem she can no more be endowed as against the mortgagee, or those claiming under him, than if the mortgage deed had been made absolute.[2] This principle applies with especial force where the mortgagee has entered under the mortgage for forfeiture of the condition. Where this is the case, the mortgagee, or those invested with his rights, may successfully defend the possession in a court of law against a claim for dower, and the widow is compelled to go into a court of equity, where, upon redeeming, she may obtain relief.[3] In some cases, the proportion which she should contribute by way of redemption must be first ascertained, and fixed by decree. Where this is the case, payment can not be made before instituting the proceeding, but when the amount has once been determined, the court will require it to be paid before ordering an assignment of dower.[4] It follows, therefore, that it is not only unnecessary, but impracticable to have an assignment of dower before instituting proceedings to redeem.[5]

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[1] Keith *v.* Trapier, 1 Bailey's Ch. 63.

[2] Watson *v.* Clendenin, 6 Blackf. 477; Gibson *v.* Crehore, 5 Pick. 146; Brown *v.* Lapham, 3 Cush. 551, 554; Cass *v.* Martin, 6 N. H. 25; Rossiter *v.* Cossit, 15 N. H. 88; Hastings *v.* Stevens, 9 Foster, 564.

[3] Van Duyne *v.* Thayre, 14 Wend. 233; S. C. 19 Wend. 162; Thompson *v.* Boyd, 2 Zab. 543; 4 Kent, 45.

[4] Gibson *v.* Crehore, 5 Pick. 146; Danforth *v.* Smith, 23 Verm. 247; Bell *v.* Mayor of N. Y., 10 Paige, 49; Woods *v.* Wallace, 10 Foster, 384; Van Vronker *v.* Eastman, 7 Met. 157.

[5] Gibson *v.* Crehore, 5 Pick. 146, 149.

Right of a widow who has redeemed to be reimbursed.

23. It has already been incidentally stated that a widow who has entirely redeemed a mortgage incumbrance, or who has paid more than her proportion, may take and hold possession of the mortgaged premises, as against those whose duty it is to contribute, until she is reimbursed; and this is the prevailing rule. In Palmes *v.* Danby,[1] the lord keeper allowed a dowress to redeem a mortgage on land which had descended to an infant, subject to incumbrances, by paying her proportion of the mortgage money, and to hold over for the rest. By this it is understood her proportion of the debt was to be borne by her dower interest, and that she was to hold the land in the character of an assignee of the mortgage, until she was reimbursed as to the residue of the mortgage debt. In Banks *v.* Sutton,[2] Sir Joseph Jekyll gave to the widow her dower in the equity of redemption of a mortgage in fee; and though the case has since been overruled in the English courts, in respect to her title in such a case, yet upon the assumption that she was entitled, the terms of the decree were, no doubt, just, and ought to be regarded as authority. In that case, the master of the rolls allowed to the widow the arrears of her dower; she to allow or keep down one-third the interest of the mortgage money unsatisfied at the date of the death of her husband. The rule generally applied in the American courts is in conformity to the principle of these decisions.[3]

Foreclosure and sale after the husband's death.

24. The statute of New York provides that where

The mortgagee, or those claiming under him, shall, after the death of the husband of such widow, cause the land mortgaged to be sold, either under a power of sale contained in the mortgage, or by virtue of the decree of a court of equity, and any surplus shall remain after payment of the moneys due on such mortgage and the costs and charges of the sale, such widow shall, nevertheless, be entitled to the interest or income of the one-third part of such surplus for her life, as her dower.[4]

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[1] Palmes *v.* Danby, Prec. Ch. 137. The mortgage in this case was for years, only.

[2] Banks *v.* Sutton, 2 P. Wms. 700.

[3] Swaine *v.* Perine, 5 John. Ch. 482; Carll *v.* Butman, 7 Greenl. 102; Woods *v.* Wallace, 10 Foster's N. H. Rep. 384, 388; Bell *v.* Mayor of N. Y., 10 Paige, 49; Gage *v.* Ward, 25 Maine, 101, 103; McMahan *v.* Kimball, 3 Blackf. 1, 12; Gibson *v.* Crehore, 5 Pick. 146, 152; Wilkins *v.* French, 20 Maine, 111; 4 Kent, 162.

[4] 1 N. Y. Rev. Stat. pp. 740, 741, § 6; 3 N. Y. Rev. Stat. (5th ed.) p. 31, § 6.

This section embodies the general rule regulating the right of dower in cases where a foreclosure and sale occur after the husband's death. Similar enactments are in force in other States and in the District of Columbia.[1]

25. There are many reported cases in which this rule is recognized and enforced. In Smith *v.* Jackson and Titus *v.* Neilson it is said that upon foreclosure, the right of dower, in equity, attaches upon the surplus.[2] So in Hawley *v.* Bradford, the rule was declared that upon foreclosure and sale after the husband's death, the widow is entitled to the value of a life estate in one-third the surplus proceeds of the sale, after deducting costs of the foreclosure, but without a deduction of the costs of the reference to settle her claim to the surplus.[3] In Tabele *v.* Tabele, the widow of a mortgagor was made party to a bill of foreclosure. She answered, submitting to the decree of the court. It was held that she was entitled to the use of one-third the surplus after satisfying the mortgage, as equitable dower, and to her costs out of the other two-thirds. The third assigned her was ordered to be put at interest for her benefit.[4] In Jennison *v.* Hapgood, dower was allowed in the proceeds of a sale of an equity of redemption by the administrator of the husband, the proportion assigned for dower being the interest on one-third the sum for which the equity sold, during the life of the widow.[5] That dower attaches upon the surplus in case of foreclosure and sale after the death of the husband, was also held in Mississippi.[6] So in New Jersey[7] and Ohio.[8] In case of such sale, the surplus represents the equity of redemption, and it is upon that surplus dower attaches.[9]

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[1] 1 Purple's Dig. Ill. Stat. p. 494, ch. 2, § 5; Stat. of Ill. (1858,) p. 152, § 5; Rev. Stat. Ark. (1838,) p. 337, § 6; Dig. Stat. Ark. (1858,) p. 452, § 6; Rev. Stat. Wis. (1858,) p. 546, § 5; Rev. Stat. Ky. (1852,) p. 398, § 6; Stanton's Rev. Ky. Stat. vol. ii. p. 26, § 6; Code of Va. (1849,) p. 474, § 8; Stat. Oregon, (1855,) p. 405, § 5; Rev. Stat. Minn. (1858,) p. 407, § 5; 2 Comp. Laws Mich. (1857,) p. 851, § 5; Rev. Code Dist. Col. (1857,) pp. 199, 200, § 4.

[2] Smith *v.* Jackson, 2 Edw. Ch. 28; Titus *v.* Neilson, 5 John. Ch. 452.

[3] Hawley *v.* Bradford, 9 Paige, 200.

[4] Tabele *v.* Tabele, 1 John. Ch. 45; accord. Mills *v.* Van Voorhis, 23 Barb. 125; Reed *v.* Morrison, 12 Serg. & R. 18, 21.

[5] Jennison *v.* Hapgood, 14 Pick. 345.

[6] Rutherford *v.* Munce, Walker, 370. And see Mantz *v.* Buchanan, 1 Md. Ch. Decis. 202.

[7] Hartshorne *v.* Hartshorne, 1 Green's Ch. 349.

[8] Smith *v.* Handy, 16 Ohio, 237.

[9] Hinchman *v.* Stiles, 1 Stockt. 361; Ibid. 454; Harrow *v.* Johnson, 3 Met. Ky. Rep. 578.

In South Carolina the same ruling has been made.[1] If the lands sell for less than the mortgage debt, it follows that there is nothing upon which dower can attach.[2] In a case where, after assignment of dower, the mortgagee filed a bill against the heir and personal representative of the husband for foreclosure and sale, and after decree, the commissioner, not being able to sell the premises for a sum sufficient to pay the mortgage money, conveyed them to the mortgagee according to the directions of the decree, it was held that the widow of the mortgagor was not, under these circumstances, entitled to retain her dower in the premises.[3]

Foreclosure and sale during the husband's lifetime.

26. A question of much interest and no inconsiderable practical importance arises with respect to the right of a wife to have her contingent dower interest in equities of redemption protected by an investment of a just proportion of the surplus proceeds of a sale, where proceedings in foreclosure are had during the lifetime of the husband. But few reported cases are to be found, however, in which this question was made the subject of judicial consideration.

27. In Titus *v.* Neilson,[4] husband and wife were made parties defendant to a suit in foreclosure founded upon a mortgage in the execution of which they had joined. The husband died after the decree was rendered, but before the sale. The chancellor gave the widow dower in the surplus remaining after satisfying the decree, but he placed his decision upon the ground that her right had become consummate upon the death of her husband before the sale; and he remarked, parenthetically, that it was clear she would have had no claim upon the surplus proceeds, had her husband been living. In the opinion delivered by the vice-chancellor in the case of Bell *v.* The Mayor of New York,[5] he observed that "upon a sale under a power, in the lifetime of the husband, the surplus is regarded as personalty and may be paid to the husband;[6] and upon a chancery sale the husband is entitled to the surplus moneys, and no

[1] Keith *v.* Trapier, 1 Bailey's Ch. 63; Brown *v.* Duncan, 4 McCord, 346.

[2] Nottingham *v.* Calvert, 1 Carter, 527.

[3] McMahan *v.* Kimball, 3 Blackf. 1.

[4] Titus *v.* Neilson, 5 John. Ch. 452. See, also, Bell *v.* Mayor of New York, 10 Paige, 49, where the husband died pending the suit and before decree.

[5] Bell *v.* The Mayor of New York, 10 Paige, 49, 55.

[6] Wright *v.* Rose, 2 Sim. & Stu. 323.

provision is made for the wife." In support of the latter proposition he cited Titus *v.* Neilson, but upon appeal the point was not noticed by the chancellor. In Frost *v.* Peacock,[1] the husband died after sale and confirmation, but before the moneys arising from the sale had been distributed. It was nevertheless held that the widow could not be endowed of the surplus. The vice-chancellor said: "But if that deed had not been made, it would be doubtful whether she could claim dower in the surplus arising from the sale in foreclosure, inasmuch as her husband was living when the decree was made, and when the sale took place, and for a considerable time afterward. Titus *v.* Neilson, 5 J. C. R. 452; and see Hawley *v.* Bradford, 9 Paige's C. R. 200. I think, with the master, that her dower is cut off entirely."

28. But in Denton *v.* Nanny,[2] the Supreme Court of New York, in an elaborate opinion, sustained the claim of the wife to have a proportion of the residuum of the sale invested in such manner as would secure to her the enjoyment of her dower interest in the event she survived her husband. In that case certain judgment creditors of the husband sought to have their claims satisfied from the balance of the moneys remaining after satisfying the mortgage debt, and insisted that inasmuch as the sale had taken place in the lifetime of the husband, the contingent right of dower of the wife was entirely extinguished. The court refused to sustain this proposition. They said: "Are not the equities of the wife as strong as those of the husband? During coverture she is often without the means, and therefore without the ability to pay the mortgage debt. And the only real protection which the court can extend to her, when the husband can not or will not pay, is to give her the same right in the surplus proceeds after the satisfaction of the mortgage, as she had in the mortgaged premises before the mortgage was executed. If the judgment creditors may take the surplus, so may the husband. Their rights as against the wife are no greater than his; and if the whole surplus is to be handed over to them, then a husband, with ample means at his command, may suffer a foreclosure and sale when the premises are oftentimes of greater value than the mortgage debt, for the express purpose of freeing the estate from the first claims of the wife. . . . . Land has been sold in which the wife had a legal interest, which was not required to pay the

[1] Frost *v.* Peacock, 4 Edw. Ch. 678.

[2] Denton *v.* Nanny, 8 Barb. 618.

mortgage debt. And upon the principle of equitable conversion, the proceeds, so far as it respects her, must still be regarded as real estate. The claim of the judgment creditors rests upon the same foundation. Their interest in the land, like the interest of the wife, has been divested by the sale under the decree, and their liens attach in equity upon the proceeds of the land unnecessarily sold, in the same order of priority as they existed upon the land before sale. . . . . She does not ask to have the money put into her immediate possession. She would have no right to that; but she insists that the residuum of the subject mortgaged, not required to satisfy the mortgage debt, whether it exists in lands unsold, or in the proceeds of land sold under the power of the court, shall be so appropriated as to secure her dower should she survive her husband. This I think she is entitled to have done. In bringing the rights of the wife within the influence of those equities which the courts are constantly extending to others, no injustice is done to the husband or to his judgment creditors; for, after providing a security for the wife, they have the same rights in the surplus as they had in the lands before the sale under the mortgage."[1]

29. The ruling in the foregoing case was approved and followed in Vartie *v.* Underwood.[2] "The next exception on behalf of the creditors," say the court in the latter case, "raises the question whether or not the wife's inchoate right of dower in the husband's land follows the surplus moneys raised by a sale in virtue of the power of sale in the mortgage executed by her with her husband, and should be protected against the claims of her husband's creditors. The referee held that it did, and that one-third of the surplus should be invested, and the interest, only, paid to the creditors during their joint lives. This follows the decision in Denton *v.* Nanny. Upon this point I shall repose myself on the authority of that case . . . . and am content to adopt it until it shall be reversed or overruled by the court of dernier resort."

30. The reasoning in Denton *v.* Nanny appears to be founded in good sense, and the conclusion to which the court arrived in accordance with substantial justice. It may be somewhat questionable whether courts of chancery, in the exercise of their ordinary equity jurisdiction, are clothed with the power to make an order of the character entered in the case referred to, and whether some aid from the legis-

[1] Denton *v.* Nanny, 8 Barb. 618. [2] Vartie *v.* Underwood, 18 Barb. 562.

lative authority is not necessary to its legitimate exercise. But whatever argument may be urged against the strict legality of the exercise of the power, there can be no doubt of its intrinsic justice. In an early case that arose in Virginia under the act allowing dower in equitable estates, the hazards to which the dower interest of the wife was exposed, where there was a foreclosure in the lifetime of the husband, were adverted to, and the mode of protection adopted in Denton *v.* Nanny was there suggested. "It may be said, though," remarked Coalter, J., "that this right is contingent during the life of the husband; but if she was a party, might not a court of equity, on his failure to redeem, very properly provide a settlement for her, equal to one-third of the balance of the purchase money in case she survived? And if this was not done, might not mortgages for small sums be resorted to, in order to defeat dower rights; the wife during coverture not having it in her power to redeem? . . . . It may, however, be well worthy of consideration, how far it may be the duty of courts in such case as that, or of this, if they are alike in that respect, to direct the balance of the purchase money to be paid into court, and to inquire whether there be a wife entitled, and make provision accordingly. This I merely throw out for consideration and caution, without intending to be understood as giving any opinion upon it."[1] Impressed with this view, no doubt, the codifiers of the laws of the District of Columbia have provided, by express enactment, for the due protection of the interests of the wife, where a sale of mortgaged premises is made in the husband's lifetime. The statute there in force declares that

> When any real estate in which the wife has her dower right is sold in the lifetime of her husband, under a deed of trust or mortgage executed by the husband before marriage, or in which the wife has joined with privy acknowledgment certified as provided in chapter 48, the trustee making such sale shall, under the direction of the Circuit Court, invest one-third of the proceeds of sale remaining after paying off the incumbrances that are valid against the wife, so that she may have secured to her, in the event of her surviving her husband, the interest thereon for the remainder of her life from the date of his death, free from any liability of his.[2]

Section eighteen of the same act provides for the release by the wife of her interest in the fund, and for its payment, in the event of such release, to the husband, or a third person for his benefit. The

[1] Heth *v.* Cocke, 1 Rand. 344.

[2] Rev. Code Dist. Col. (1857,) ch. 70, p. 301, § 17.

release is required to be executed and acknowledged as in cases of conveyances of real estate.

In Virginia, the following still more comprehensive enactment is in force:—

Where land is *bona fide* sold in the lifetime of the husband, to satisfy a lien or incumbrance thereon, created by deed in which the wife has united, or created before the marriage, or otherwise paramount to the wife, she shall have no right to be endowed in the said land. But if a surplus of the proceeds of sale remain after satisfying the said lien or incumbrance, she shall be entitled to dower in said surplus, and a court of equity having jurisdiction of the case, may make such order as may seem to it proper to secure her right.[1]

The statute of Kentucky provides that where there is a sale, the widow shall be endowed of the surplus, unless it was received or disposed of by the husband in his lifetime.[2]

Whether the wife is barred by proceedings in foreclosure in the husband's lifetime to which she was not a party.

31. The weight of authority appears to support the proposition that the inchoate right of dower of a wife is not extinguished, nor her right to redeem impaired by proceedings in foreclosure during the lifetime of her husband, unless she is made a party thereto. Vice-Chancellor Ruggles, in Bell *v.* The Mayor of New York,[3] intimated very clearly an opinion to this effect, but on appeal the chancellor deemed the consideration of the point not necessary to the final decision of the case.[4] In Denton *v.* Nanny,[5] however, the question was fairly presented, and the court determined, in accordance with the views suggested by the vice-chancellor in the case above referred to, "that a purchaser under a decree of foreclosure and sale in equity, in the lifetime of the husband, where the wife is not made a party, takes the estate subject to her equity of redemption. That

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[1] Code of Va. (1849,) p. 474, § 3. This section was reported by the revisers without the last clause, so as to conform the law to the opinion of the majority of the judges in Wilson *v.* Davisson, 2 Rob. 398. The legislature added the last clause, which conforms to the opinion of the judge who dissented in that case.—*Note to foregoing section, Va. Code*, 1849. See post, ch. 25, § 7.

[2] Rev. Stat. Ky. (1852,) p. 393, § 6; Stanton's Rev. vol. ii. p. 26, § 6.

For a discussion of the question relating to the effect of sales in partition, in the husband's lifetime, see ante, ch. 16, §§ 18–33.

[3] Bell *v.* The Mayor of New York, 10 Paige, 49, 56.

[4] Ibid. 67.

[5] Denton *v.* Nanny, 8 Barb. 618.

to bar her right to redeem she is a necessary party." The Superior Court of New York, in the recent case of Wheeler *v.* Morris,[1] came to a similar conclusion. The following observations are from the opinion delivered in that case: "Upon general principles it would seem quite clear that no separate interest of the wife could be affected by a suit to which she is not a party. Her husband is, in reference to her inchoate right of dower, in no sense her representative. The doubt which has been thrown around the question results from a want of attention to the same distinction which prevails in relation to the *right* of the plaintiff. At law, the mortgagee could maintain his possession against an action for dower. When he was in lawful possession, she had no claim, except through a redemption of the premises. Hence it is said, that when the mortgagee is in, by entry or foreclosure, he may defend himself there, and the consent of the husband is sufficient to enable him to obtain possession. Such a possession may be gained through a foreclosure in the lifetime of the husband although the wife be not a party. Acquiring all the interest of the husband, is sufficient for that purpose. Further than this, no case has gone which has fallen under our observation. But a possession gained does not of itself defeat the equity of redemption: it may be defended at law until payment of the debt. We apprehend, that as to the interests of all persons who are not parties to the suit for foreclosure, (either directly or by representation,) the suit is wholly inoperative. Making the husband a party doubtless has the same effect as if he and the mortgagee had united in the conveyance to the purchaser, under the decree, but it can have no greater effect."

32. Mills *v.* Van Voorhis, decided in the Court of Appeals after the determination of the case above referred to, appears to have authoritatively settled the question in New York. The case first came before the Supreme Court, and although the mortgage in question was given for the purchase money of the lands, that court followed the decision in Denton *v.* Nanny, and held that in order to bar her dower the wife must be made a party to the proceeding in foreclosure.[2] The Court of Appeals were of the same opinion. "It is entirely clear, therefore," said Selden, J., "that if the wife of one who owns real estate subject to a mortgage given for purchase

[1] Wheeler *v.* Morris, 2 Bosw. 524.

[2] Mills *v.* Van Voorhis, 23 Barb. 125, S. B. Strong, J., dissenting.

money, has any inchoate dower rights at all, in respect to such property, these rights, unless by virtue of the statute, could not be affected by a foreclosure suit to which she is not made a party; and a purchaser under such a foreclosure would not obtain an unincumbered title. That she has rights of this description, under the principles uniformly applied to mortgages in this country, is, I think, too clear to be denied. . . . . These views accord with, and are sustained by those expressed by both the vice-chancellor and chancellor in the case of Bell *v.* The Mayor of New York, so far as that case involved the questions presented here. In that case the foreclosure was not completed until after the death of the mortgagor; and hence it did not become necessary to determine the effect of a foreclosure in his lifetime. There is not the slightest reason, however, for giving to such a foreclosure any greater effect in cutting off the dower rights of the wife of the mortgagor, than to one which takes place after his death. The inchoate rights of the wife are as much entitled to protection as the vested rights of the widow. Neither can be impaired by any judicial proceeding to which she is not made a party."[1]

33. Upon the general subject of parties to suits in equity, Judge Story says: "Courts of equity adopt two leading principles for determining the proper parties to a suit. One of them is a principle admitted in all courts upon questions affecting the suitor's person and liberty, as well as his property, namely, that the rights of no man shall be finally decided in a court of justice unless he himself is present, or at least, until he has had a full opportunity to appear and vindicate his rights. The other is, that when a decision is made upon any particular subject-matter, the rights of all persons whose interests are immediately connected with that decision, and affected by it, shall be provided for as far as they reasonably may be."[2] If it be settled, as held in New York, that a wife is entitled to have a portion of the surplus proceeds of a sale in foreclosure invested for her benefit, it would seem clear, upon the principle laid down in this text, that she is a necessary party to a proceeding of that character. If the law give her a right to any part of the fund, then she should have an opportunity to assert it, and to protect herself against loss.

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[1] Mills *v.* Van Voorhis, 6 Smith, (20 New York,) 412. See, also, Lewis *v.* Smith, 5 Selden, 502.

[2] Story's Equity Pleadings, § 72.

In the case of Heth *v.* Cocke,[1] already referred to, (ante, sec. 30,) the court remarked that they were not aware of any case in which it had been held necessary to make the wife a party where the suit was in the lifetime of the husband; they suggested, however, that it is a grave question whether it is not the duty of courts of equity to protect her interest by some sort of settlement from the fund; and whether, for this reason, she is not a necessary party. But they left both points undecided. Other reasons why the wife should have her day in court may be stated. For instance, several parcels of real estate may be mortgaged, either of which would be sufficient to satisfy the debt. A due regard to her rights would require that the decree should be so shaped as to preserve to her her interest in the parcels not necessary to be sold.[2] In a case where the mortgage debt was payable in installments, and the master reported that the amount which had become due could be satisfied by a sale of one parcel, only, of the premises mortgaged, the court recognized the right of the widow to insist that the sale should be limited to that parcel, although the remaining parcels might be insufficient to satisfy the residue of the debt when it became due.[3]

34. In Bell *v.* The Mayor of New York,[4] the husband died pending the suit and before decree. The wife was not made a party to the original bill nor to the proceedings for revivor. The chancellor was unhesitatingly of opinion that she was not bound by the decree rendered in the case against the heirs and representatives of the deceased, and allowed her to redeem.[5]

Terms upon which a dowress may redeem where there has been a foreclosure to which she was not a party.

35. This subject is very fully discussed by Chancellor Walworth in Bell *v.* The Mayor of New York,[6] and his conclusion in the premises is thus expressed: "The adjustment of the equitable rights of the parties becomes more complicated in this case, from the circumstance that the complainant has only a life interest in an undivided portion

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[1] Heth *v.* Cocke, 1 Rand. 344.
[2] Titus *v.* Neilson, 5 John. Ch. 452.
[3] Bank of Ogdensburgh *v.* Arnold, 5 Paige, 38.
[4] Bell *v.* The Mayor of New York, 10 Paige, 49.
[5] Accord. Heth *v.* Cocke, 1 Rand. 344.
[6] Bell *v.* The Mayor of New York, 10 Paige, 49.

of the premises, and that there has been a valid foreclosure as to every other estate or interest. And the statute limiting a widow's claim for arrears of dower, to the time when her dower is demanded, and declaring that she shall only recover the arrears for six years, renders the adjustment of her rights still more complicated. Still I think the rights of the parties can be adjusted without departing from the general principles upon which the court permits a redemption in other cases. In the ordinary case of a life estate in the equity of redemption existing in one person and the remainder in fee belonging to another, if the mortgagee has foreclosed the equity of redemption of the remainder-man, but has, through inadvertence, neglected to make the owner of the life estate a party to the foreclosure, the latter can not claim possession of the premises during the continuance of his life estate, upon paying the interest on the amount due upon the mortgage, from year to year, for life. But the court should, in such case, direct the master to fix a gross sum, upon the principles on which the present value of a life annuity is calculated, considering the annual interest on the amount then due on the mortgage as the annuity. And the proportion of the mortgage money which the owner of the life estate ought to pay being thus ascertained, he should be permitted to redeem his interest in the mortgaged premises by the payment of that amount; and then to be let into the possession during the continuance of his particular estate in the premises. Or the decree might direct his life estate to be sold, for the purpose of satisfying his proportion of the debt thus ascertained, and that the surplus arising from such sale should be paid to him. The same mode would have to be adopted to settle the relative proportions which the owner of the life estate and the remainder-man ought to pay, to redeem the premises, where the mortgage has not been foreclosed as to either. If the mortgagee has been in possession of the mortgaged premises, in such a case, the mode of ascertaining the balance due upon the mortgage at the time of redemption will also be precisely the same as if the equity of redemption of the whole premises, in fee, had belonged to one person."[1]

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[1] Bell *v.* The Mayor of New York, 10 Paige, 49, 70.

Foreclosure by entry of the mortgagee.

36. By the Revised Statutes of Massachusetts, a mortgagee, after breach of the condition of the mortgage, may make an open and peaceable entry on the estate mortgaged, if not opposed by the mortgagor or other person claiming it; and such possession being continued peaceably for three years, will forever foreclose the right of redemption.[1] Several cases have arisen involving a construction of this enactment as between the mortgagee and the widow of the mortgagor. It has been decided that to render an entry and a subsequent possession for three years effectual in law to foreclose the mortgage, there must be notice, express or implied, to the person who is to be bound by such foreclosure, of the purpose for which the possession is taken and held. And where the purchaser of an equity of redemption was in possession under his deed, and afterwards made an entry and held possession for three years as assignee of the mortgage, without notice to the widow of the mortgagor, it was held her right to redeem was not foreclosed.[2] In Lund *v.* Woods, it was decided that, in order to render possession under the statute effectual against the widow, it was necessary to notify her, *after* her husband's death, and three years before she made claim for dower, that possession was taken and continued for the purpose of foreclosure. The fact that she had actual knowledge of the possession, and of its continuance, was held not to dispense with the required notice.[3]

Whether the widow may have the mortgage satisfied from her husband's estate.

37. In Park on Dower, it is said: A dowress, like an heir or devisee, has, of course, a right to have the personal estate of her husband, as far as it will go, applied in discharge of mortgages, and other debts contracted by the husband, which are charges upon the land which she holds in dower. And even where the personal estate is insufficient to discharge the debt, it would seem that in some cases, if not in all, she has the privilege of having the lands which remain in the heir charged therewith, in exoneration of the land assigned to

[1] Rev. Stat. Mass. 1836, p. 634, § 1; p. 636, § 13.

[2] Gibson *v.* Crehore, 5 Pick. 146; Eaton *v.* Simonds, 14 Pick. 98; Lund *v.* Woods, 11 Met. 566.

[3] Lund *v.* Woods, 11 Met. 566.

her in dower.[1] Thus, if the husband, before marriage, becomes indebted to the crown, and afterwards his wife is endowed, and the sheriff distrains on her dower for the husband's debt, she may have a writ directed to the sheriff, commanding that he do not distrain the wife for the king's debt; and she may have such writ out of the chancery, directed to the Treasurer and Barons of the Exchequer, commanding them that they inquire thereof, and if they find the same, that they surcease and discharge the wife, with a proviso in the writ; provided that those debts shall be levied upon the executor or heir of the aforesaid A. and upon the tenants of the land which were his, and which, of right, ought to be charged therewith, as is just.[2]

38. In the United States the cases upon this subject are somewhat conflicting, but the weight of authority appears to be rather against the English doctrine. In Scott *v.* Hancock,[3] it is said of the rule in England, making it the duty of the personal representative to apply the personalty to the relief of the real estate, that its object is "to take the personal estate from those who would be entitled to it under the statute of distributions, and apply it in ease of the heir, to discharge the real estate descended to him. This reason," it is added, "does not apply in this commonwealth. The whole estate, real and personal, is liable for all the debts of the deceased; and by our statute of distributions, the real estate goes to the same persons, and in the same proportions, as the personal estate." The court, also, in the same connection, refused to recognize any right in the widow of a deceased mortgagor, to compel the heirs to redeem from the estate descended to them: "It appears, moreover," they said, "that this mortgage was made by the intestate before his marriage with the petitioner, and this recovery against her by the mortgagee is a lawful eviction of her dower. In such a case she is entitled to be endowed anew; and she will then receive the full third part of all the real estate of her husband, of which she was by law dowable. If the effect of the order of sale now prayed for, would be to leave

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[1] If the husband's goods be not sufficient for payment of his debts, the heir must discharge dower of the burden, &c., for he is the widow's warrant of her dower, and ought to follow for her county court, court leet, and hundred, &c., that she may see to her house, and nurture of her children. Woman's Lawyer, 1632, p. 289, cites Bracton.

[2] Park, Dow. 351, 352; Fitzh. N. B. 150, (Q.); 46, (G.); Gilb. Uses, 407–12.

[3] Scott *v.* Hancock, 13 Mass. 162, 166.

the land in her hands discharged of the mortgage, and to throw the whole burden upon the heirs, it would be extremely unjust; as it would, in effect, give her a larger portion of the estate than she could ever have lawfully claimed. The whole real estate of the intestate was not worth so much, by the amount of his mortgage, as it was supposed to be when her dower was assigned; and her portion of it ought to abate with those of the heirs."[1]

39. In Bird *v.* Gardner,[2] which was an action at law for dower in an equity of redemption, the court nonsuited the plaintiff, but at the same time suggested that in a court of chancery, having general jurisdiction in matters of equity, relief might possibly be granted her, and that perhaps her demand of dower might be enforced by some specific remedy to compel the representative of the mortgagor to redeem. And again, in Gibson *v.* Crehore,[3] the court, in discussing questions relating to dower in equities of redemption, said: "Without doubt the executors and administrators, if there be personal estate whereby the debt may be discharged, may be compelled to contribute their just proportion in order to liberate the estate for the heirs, or for the creditors, if it should be for their interest to have the estate redeemed, and to enable the widow to have her dower." But afterwards, in a case in equity between the same parties, the court refused to sanction this proposition to its full extent. They said: "Next it was argued that the administrators are bound to apply the personal estate to the redemption of the mortgage, and that the defendant, being a purchaser with notice, and having covenanted with the administrators to take up and discharge the mortgage, is bound to see to the application of the personal assets for this purpose; and at all events, can not now set up the mortgage in contravention of his covenant. Whether such would be the legal effect of the assignment, if the administrators were bound so to apply the personal estate, we do not determine, being of opinion, that as the estate of Gibson appears to be insolvent, the administrators are not bound to apply the personal assets to the redemption of the mortgage; nor have they any right so to do. The creditor's lien on the personal estate is paramount to the claims of the widow and heirs."[4] This ruling has since been followed in Indiana.[5]

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[1] Scott *v.* Hancock, 13 Mass. 162, 168.
[2] Bird *v.* Gardner, 10 Mass. 364.
[3] Gibson *v.* Crehore, 3 Pick. 475, 481.
[4] Ibid., 5 Pick. 146, 150.
[5] Whitehead *v.* Cummins, 2 Carter, 58.

40. In Rossiter *v.* Cossit,[1] the administrator of a mortgagor whose estate was insolvent, redeemed the lands with the assets of the estate. The court held that the widow was thereby let in to her dower without contribution, but that the administrator must make good any loss which other parties interested in the estate had sustained by reason of such application of the funds. "The administrator," the court observed, "had a discretion in this case in relation to the redemption, but it was not an unlimited discretion. It was his duty to redeem lands mortgaged for less than their value, or to sell the equity; and the estate being insolvent, it was his duty in this case to take that course which would be most beneficial to those interested in the distribution. The estate being insolvent, he had not a discretion to expend the funds which belonged to the creditors, in a redemption for the benefit of the widow." Substantially the same ruling was made by the same court, in Hastings *v.* Stevens.[2]

41. In New York, also, the point has been explicitly determined against the widow. In Hawley *v.* Bradford,[3] which was a proceeding in foreclosure, the widow claimed the right to be endowed of one-third of the proceeds of the mortgaged premises, provided the whole value of her dower, upon the principle of life annuities, did not exceed the amount of the surplus money raised upon the sale, on the ground that her joining in the mortgage must be considered as a mere security for the husband's debt. The chancellor went fully into the consideration of the question. He said: "It is settled law that where the wife pledges her separate estate, or the reversionary interest in her real property, for the debt of her husband, she is entitled to the ordinary rights and privileges of a surety.[4] If the same principle is to be applied to the case of the wife joining in a mortgage of the real estate of the husband, for the purpose of barring her contingent right of dower therein, the claim of the exceptant in this case must be sustained. For the equitable claim of the surety to have the mortgage satisfied out of that estate or interest in the premises which belongs to the principal debtor alone, is entitled to a preference over the claims of the subsequent incumbrancers to have

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[1] Rossiter *v.* Cossit, 15 N. H. 38, 42.

[2] Hastings *v.* Stevens, 9 Foster, 564, 572. See, also, Young *v.* Tarbell, 37 Maine, 509, 515.

[3] Hawley *v.* Bradford, 9 Paige, 200.

[4] Clancy's Husb. and Wife, 589; Neimcewicz *v.* Gahn, 3 Paige, 614; S. C. 11 Wend. 312; Vartie *v.* Underwood, 18 Barb. 562.

their debts satisfied out of the same estate or interest in the premises. I am not aware of any decision, however, in which the principle of suretyship has been applied to a case like the present. And the two cases which came before my learned predecessor, Chancellor Kent, were disposed of upon the supposition that the wife who had joined the husband in a mortgage of his estate, was not entitled to have such mortgage satisfied out of the husband's interest in the premises, exclusively, so as to give her the full benefit of her dower in the whole premises, and not in the equity of redemption merely.[1] Strictly speaking, the wife has no estate or interest in the lands of her husband during his life, which is capable of being mortgaged or pledged for the payment of his debt. Her joining in the mortgage, therefore, merely operates by way of release or extinguishment of her future claim to dower as against the mortgagee, if she survives her husband; but without impairing her contingent right of dower in the equity of redemption. The master was, therefore, right in supposing that Mrs. Bradford was not entitled to be endowed of the whole proceeds of the mortgaged premises, but only of the surplus which remained after paying the mortgage debt and the costs of foreclosure."[2]

42. In Holmes *v.* Holmes,[3] a husband, for the purpose of depriving his wife of any share of his personal property after his death, purchased real estate from his son at a price far beyond its value, and gave his bond and mortgage for the purchase money, the collection of which was not to be enforced during the life of the husband. The amount due on the bond and mortgage at the death of the husband was equal to the whole amount of his personal estate. Upon a bill filed by the widow against the son to set aside the bond and mortgage, the chancellor held the transaction valid, and refused to disturb it. But as it appeared that there was sufficient personal property in the hands of the defendant to satisfy the mortgage, a decree was entered requiring him to discharge the same, so far as it was an incumbrance on the real estate.

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[1] Tabele *v.* Tabele, 1 John. Ch. 45; Titus *v.* Neilson, 5 John. Ch. 452. See, also, Evertson *v.* Tappen, Ibid. 497, 513.

[2] Hawley *v.* Bradford, 9 Paige, 200. And see House *v.* House, 10 Paige, 158, 164. But see, also, the remarks of the chancellor in Sandford *v.* McLean, respecting the right of the widow to have paramount judgment liens satisfied from the assets of the estate, 3 Paige, 117.

[3] Holmes *v.* Holmes, 3 Paige's Ch. 363.

43. In Hinchman *v.* Stiles,[1] the chancellor of New Jersey made a ruling similar to that in Hawley *v.* Bradford. The widow of a mortgagor claimed that she was entitled to the whole surplus produced by a sale of the mortgaged premises, for her dower in the entire estate. But the chancellor disallowed this claim. He said: "She is entitled to nothing more than her dower in the equity of redemption. The sum represents that equity of redemption. She is entitled to the interest on one-third of it and no more. Suppose the sheriff had sold two-thirds of the lot, and paid off the incumbrance; it is very clear that the widow would not have been entitled to the whole of the remaining one-third of the land as her dower. She would have been entitled to her dower, that is her thirds, in the land that remained unsold."

44. There are many decisions limiting the dower of the wife, in cases of sales in foreclosure, to the interest of one-third the surplus proceeds of the sale. And there are, also, in several of the States, statutory restrictions to the same effect.[2]

45. The following case, decided in Virginia, is in conformity to the prevailing doctrine: A. owned land subject to a deed of trust made to secure certain indebtedness. He sold the land to B., who retained the amount of the debt out of the purchase money to enable him to discharge it. B. died without having made payment, and owing other debts exceeding in amount the value of his personalty. It was held that the land covered by the trust deed was the primary fund for the payment of the debt, and that the widow of B. could not require its payment from the personalty; but that she might go into equity for a sale of the land, and claim dower in the surplus.[3]

46. In some of the States, however, a more liberal doctrine is extended to the widow. In Vermont it is provided by statute that if it be for the benefit of those interested to redeem an outstanding mortgage incumbrance, either from the personalty, or by a sale of real estate, the administrator shall act in the premises and redeem the mortgage. And if there be sufficient personal property to satisfy the mortgage, the court may order dower in the whole land. In other cases the widow has dower upon payment of her proportion of the debt.[4]

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[1] Hinchman *v.* Stiles, 1 Stockt. Ch. 361, 454.

[2] Ante, §§ 24, 25.

[3] Daniel *v.* Leitch, 13 Gratt. 195.

[4] Verm. Rev. Stat. 289, §§ 2–4; Comp. Stat. Verm. 362, §§ 2–4.

47. In South Carolina it has been decided that a widow is entitled to dower in lands subject to a mortgage for the purchase money: That it is the duty of the executor to pay the debt from the personal assets; and if, in default of such payment, the mortgage is enforced, the widow is entitled to have her claim satisfied from the personalty.[1]

48. In Maryland it was held that a wife who unites in a mortgage may claim dower, subject thereto. That she has a right to redeem, and may call on the personal representative of the husband to apply the personal assets to the extinguishment of the mortgage debt, so as to free her dower from the incumbrance.[2]

49. In Kentucky, also, the courts incline to the same liberal view in favor of the widow. In the case of Harrow *v.* Johnson,[3] the court said: "As between Mrs. Harrow and her husband, she had a right, in equity, to have the proceeds of the personalty embraced in the mortgage first applied to the mortgage debt, so as to relieve the land in which she had an interest. If the mortgagee had sued Harrow and wife for a foreclosure, the court would have directed a sale of the personalty and of so much of the land as would pay the residue of the mortgage debt. Mrs. Harrow was under no obligation to the general creditors of her husband. As against them she had the same equitable right to have the mortgaged personalty first applied to the mortgage debt as she had against her husband." The mortgage in this case included both realty and personalty.[4]

50. And in Rhode Island, the question appears to be settled in favor of the widow. In a well-considered case decided in that State, the point is discussed in these terms: "At the decease of Thomas Mathewson, (the mortgagor,) Stephen Tucker and Arthur Mathewson were duly appointed administrators on his estate. It was their duty to pay the debts of said Thomas, so far as the real and personal estate of said Thomas was sufficient for that purpose. This duty extended to all the debts of said Thomas, as well those secured by mortgage as those not so secured. They could have been compelled to pay them, as well out of the real as the personal estate of the intestate. The holder of a debt secured by mortgage is not bound to look to the mortgaged premises alone for payment; the

[1] Hanegan *v.* Harllee, 10 Rich. Eq. 285; Keckley *v.* Keckley, 2 Hill, S. C. Ch. 250.
[2] Mantz *v.* Buchanan, 1 Md. Ch. Decis. 202.
[3] Harrow *v.* Johnson, 3 Met. Ky. R. 578, 581.
[4] See, also, Reed *v.* Morrison, 12 Serg. & R. 18, 21.

mortgage was given only as security for payment and not as payment. Under our statute he could compel the administrator to discharge the debt. . . . In case the personal estate had been solvent, the heirs at law of said Thomas would have insisted that the administrators should have paid this debt, although the widow would thereby have been let in to dower in the mortgaged estate. For otherwise she would have been entitled to one-half or one-third of the surplus personal estate in fee, whereas by paying the mortgage she would be let in to the enjoyment of one-third of the real estate for life. But in this State neither the solvency nor insolvency of the estate can vary the duties of the administrator. He is bound and compellable to devote the whole of his intestate's estate, real and personal, to the discharge of his debts, without distinction. His manner of doing this ought not to affect the rights of the widow. It comes to the same result, whether he sells the mortgaged estate, free and clear of the mortgage, and pays the mortgage out of the proceeds, and accounts with the Court of Probate for the balance, to be appropriated to the payment of the other debts; or sells it, subject to the mortgage, with an agreement with the purchaser that he shall pay the mortgage. In either case the debt is paid out of the mortgagor's estate."[1]

51. In North Carolina, also, it is held that the personal estate of the husband is the primary fund for the payment of his debts, and that the widow may require the personal representative to apply that fund in relieving the dower lands from existing mortgage incumbrances.[2]

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[1] Mathewson *v.* Smith, 1 Angell, 22, 25.

[2] Campbell *v.* Murphy, 2 Jones' N. C. Eq. 357.

CHAPTER XXIV.

DOWER AS AGAINST THE HEIR OF THE MORTGAGOR, OR THE PURCHASER OF THE EQUITY OF REDEMPTION.

§ 1–21. Where the holder of the equity has redeemed, the widow must contribute.

22–24. Whether she must contribute where the mortgage is redeemed in the husband's lifetime.

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Where the holder of the equity has redeemed, the widow must contribute.

1. It is a rule in the American States, that where the holder of an equity of redemption has redeemed the lands from a mortgage incumbrance, the lien of which was superior to the dower interest of the widow of the mortgagor, she must contribute her ratable proportion of the amount paid before she can be endowed of the estate. This doctrine, although now well settled, was for a time involved in much doubt and confusion, owing to a contrariety of decisions upon the subject; and a full exhibition of the leading cases bearing upon it, and of the grounds upon which they proceeded, seems essential to its proper understanding.

2. In Hitchcock *v.* Harrington,[1] decided in 1810, the question was presented whether a tenant in possession, who had acquired title through the heir of the mortgagor, and who had afterwards paid off the mortgage, could avail himself of the fact that the mortgage was executed for the purchase money of the lands, and simultaneously

[1] Hitchcock *v.* Harrington, 6 John. 290.

with the delivery of the deed, as a defence against the claim of the widow of the mortgagor for dower, until she reimbursed him in the amount paid, and it was held that he could not. Kent, Ch. J., said: "The mortgage no longer exists. It was paid off and discharged without having been foreclosed. The mortgage estate is extinct; and the defendants hold under the title and seizin of the husband existing prior to the mortgage. By discharging the mortgage, the title is to be deduced from the original purchase of the husband, and he is to be considered as having been seized *ab initio*. The defendants do not pretend to hold under the mortgage. The mortgagee exercised no other act of ownership than making a lease for years. The title of the defendants is wholly from the heir; and when the heir sold, the amount of the mortgage was no doubt deducted from the purchase money; and the redemption of the mortgage was for the benefit of the title derived from the heir. The question is here the same as if the heir of the husband was the defendant; and I can not perceive any principle that would allow him to set up a satisfied mortgage in bar of dower. It is now the settled law in this court, and the same principle has been recognized in the court for the correction of errors, that the mortgagor is to be deemed seized, notwithstanding the mortgage, as to all persons except the mortgagee and his representatives. When his interest is not in question, the mortgagor, before foreclosure or entry under the mortgage, is now considered, at law, as the owner of the land; and it does not lie with the heir or his assignee, to deny the seizin, and defeat the wife of her dower. If the present tenant was the mortgagee, or a person deriving title under the mortgage, the case would present a very distinct subject for consideration; and the question would then arise, whether the husband acquired a seizin by his deed of the 3d of May, 1774, competent to entitle his wife to dower, notwithstanding a mortgage to secure the purchase money was presently, upon delivery of the deed, re-executed by him. But as that question does not necessarily present itself, the court forbear to discuss and decide it. It is sufficient in this case, to say, that as the tenant claims title under the seizin of the husband, and no right arising under the mortgage and existing in the tenant, is set up, the tenant can not be permitted to avail himself of a satisfied mortgage in bar of the demandant's right of dower."[1]

[1] Hitchcock v. Harrington, 6 John. 290, 294.

3. Hitchcock *v.* Harrington was approved and followed in Collins *v.* Torry;[1] and in the latter case the court also held, that where a purchaser deriving title under the mortgagor becomes the assignee of the mortgage, the effect is to discharge the mortgage entirely in favor of the title under the mortgagor. "The mortgage is therefore to be considered as satisfied and extinguished," the court observed, "and the title of the tenant relates back, and is founded on the seizin of the husband. In no point of view can the mortgage now affect the demandant's claim." The same doctrine was applied in Coates *v.* Cheever,[2] the court being of opinion that by a union of the equitable and legal estates the mortgage became extinguished, and as a consequence that the widow of the mortgagor became dowable of the entire estate. "The spirit of the cases cited," said the court, "seems to be this; that where the tenant in possession enters by virtue of a purchase from the mortgagor, then the subsequent purchase of the mortgage by him is an extinguishment, and the widow's right relates back to the purchase by her husband, and she shall recover. But where the tenant enters by virtue of a foreclosure, or after a forfeiture for non-payment of the money, then the estate is deemed never to have vested in the husband, and the widow is not entitled to dower."

4. Thus stood the question in the *law* courts of New York, in 1823. But in 1812 a case arose in Massachusetts in which the Supreme Court of that State held an entirely different doctrine. The purchaser of an equity of redemption from the administrator of the mortgagor, had paid off the mortgage, and procured the same to be discharged of record. It was held that the widow of the mortgagor, she having joined in the mortgage, was barred of her dower. "When the tenant purchased the equity of redemption," the court said, "it belonged to him to pay the money due on the mortgage, and thus rid his estate of that incumbrance. Having all the equitable interest in himself, when he paid the money due by the mortgage, the legal estate followed the equitable interest, and he became seized of the whole fee simple. If this were not the plain legal operation of the transaction, the law would construe the discharge of the mortgage by the mortgagee a release of the legal estate by him to the tenant, who had become lawfully possessed of

[1] Collins *v.* Torry, 7 John. 278, (1810.)

[2] Coates *v.* Cheever, 1 Cowen, 463, 479, (1823.)

the equitable interest, and from whom the consideration for that discharge flowed, rather than such a mischief should follow."[1]

5. All the foregoing cases were decided in courts of law. Hitchcock *v.* Harrington and Popkin *v.* Bumstead were almost identical in their main features. In the former the title was derived from the heir, and in the latter from the administrator, of the mortgagor. In each case the tenant, while in possession, and necessarily after the death of the husband, had satisfied the mortgage. In the one case the payment was held to entirely extinguish the mortgage, leaving the tenant to rest solely on the title derived from the mortgagor, and consequently to entitle the widow of the latter to dower in the entire estate; in the other case the equity of redemption was treated as an equitable instead of a legal estate, and it was held that the satisfaction of the mortgage debt operated to convert that equitable into a legal estate, and to invest the tenant with the whole fee simple, to the absolute exclusion of dower. It seems manifest, as the law is now settled, that in each of these cases the widow was entitled to dower; but it is very questionable whether in either case she could be lawfully let in to her dower in the entire estate except upon contribution of her proportion of the amount paid for the redemption of the mortgage. If she could not, then the proper remedy was by bill in equity to redeem.

6. Collins *v.* Torry and Coates *v.* Cheever were decided upon a different principle. In those cases there was no formal discharge of the mortgages, but they were regularly assigned to the respective owners of the equities of redemption. The interest thus acquired, however, was held to merge and become lost in the legal estate, as the equity of redemption was there termed, and hence the assignment was regarded as equivalent to an actual payment and discharge of the mortgages; and, with respect to the right of dower, as attended with the same result. Assuming the merger to have taken place, as supposed by the court, and treating each transaction as a substantial payment by the respective tenants, the question would yet remain, whether, even in such case, they were not entitled to demand contribution before yielding to a claim for dower. It is difficult to perceive how either of these cases is to be distinguished

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[1] Popkin *v.* Bumstead, 8 Mass. 491. And see Bird *v.* Gardner, 10 Mass. 364. The early case of Majury *v.* Putnam, (1798,) 4 Dane's Ab. 188, 676, was to the same effect.

from any other case in which a person claiming under the husband has redeemed a mortgage valid and effectual as against the dower interest of the wife.[1]

7. Coates *v.* Cheever and Collins *v.* Torry were sharply criticised by Cowen, J., in Van Duyne *v.* Thayre. "In Coates *v.* Cheever, 1 Cowen, 475, the case of Collins *v.* Torry is recognized as holding that a purchase of the equity of redemption and entry into possession, followed by an assignment from the mortgagee to the purchaser, shall extinguish the mortgage and entitle the widow to dower; and the court followed the doctrine to that extent, without going back to look at the nature of the extinguishment. The case there adjudged is not like the one now before us, but it certainly shows Collins *v.* Torry as well as itself to be in conflict with the cases decided in the Supreme Court of Massachusetts, which appear to me to contain the true doctrine. The more Collins *v.* Torry, on which Coates *v.* Cheever was founded, shall be considered, the more, I venture to say, it will be found to have been without full consideration."[2]

8. In 1821, in the case of Swaine *v.* Perine,[3] the rule as it is now settled, requiring a widow to make contribution, where the heir or other person claiming under the husband has redeemed, was declared and applied by Chancellor Kent. The following is from his opinion in that case: "The plaintiff was a party to the mortgage to Dunn, and her claim to dower was only in the equity of redemption, or the interest which her husband had remaining in the land after satisfaction of the mortgage. Her right of dower was subject to the mortgage; and if the heir has been obliged to redeem the land by paying that mortgage to which the plaintiff was a party, she ought, in justice and equity, to contribute her ratable proportion of the moneys paid towards redeeming the mortgage. The redemption was for her benefit so far as respected her dower. To allow her the dower in the land without contribution, would be to give her the same right that she would have been entitled to if there had been no mortgage, or as if she had not duly joined in it. It would be to give her dower in the whole absolute interest and estate in the land, when she was entitled to dower only in a part of that interest and estate." The doctrine thus announced was afterwards adopted in numerous cases to which reference will be made in the ensuing pages of this chapter.

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[1] See 12 Law Reporter, 165, 167.

[2] Van Duyne *v.* Thayre, 19 Wend. 162, 171.

[3] Swaine *v.* Perine, 5 John. Ch. 482, 491.

9. With respect to the doctrine of merger as held in Collins *v.* Torry and Coates *v.* Cheever, it may be proper to say that, however inflexibly that rule is adhered to in courts of law, in courts of equity the case is different. Where there is a union of rights, equity will, nevertheless, preserve them distinct, if an intention so to do be either express or implied.[1] The distinction stated by Lord Hardwicke is, that when the owner of the fee in which the charge would otherwise merge, manifests his intent that the charge shall subsist, his intent, if clear, will prevail.[2] In Compton *v.* Oxenden,[3] Lord Thurlow observes: "It is a clear principle, both at law and in equity, that where there is a confusion of rights, where debtor and creditor become the same person, there can be no right put into exertion; but there is an immediate merger." But equity will preserve the rights distinct, according to the intent, express or implied. Wherever it is more beneficial for the person entitled to the charge to let the estate stand with the incumbrance upon it, than to take it discharged of the incumbrance, that circumstance will have a controlling influence in deciding on the implied intent.[4]

10. The rule upon this subject is also perspicuously stated by Sir William Grant, master of the rolls, in Forbes *v.* Moffatt.[5] He says: "It is very clear, that a person becoming entitled to an estate, subject to a charge for his own benefit, may, if he chooses, at once take the estate and keep up the charge. Upon this subject a court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished, where it would subsist at law, and sometimes preserve it where, at law, it would be merged. *The question is upon the intention, actual or presumed, of the person in whom the interests are united.* In most instances it is, with reference to the party himself, of no sort of use to have a charge on his own estate; and where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot."[6] This reasoning is quoted with approbation by the Court of Errors of New York in the case of James *v.* Morey,[7] where the whole subject is very fully considered

[1] 4 Brown's C. C. 408.
[2] Chester *v.* Willes, Ambler, 246; 2 Fonbl. 164, note a.
[3] Compton *v.* Oxenden, 2 Ves. Jr. 264.
[4] Per Woodworth, J., in James *v.* Morey, 2 Cowen, 246, 285.
[5] Forbes *v.* Moffatt, 18 Ves. Jr. 390.
[6] Per Sutherland, J., in James *v.* Morey, 2 Cow. 246, 303.
[7] James *v.* Morey, 2 Cow. 246.

and discussed. And in courts of equity this doctrine is now generally, if not universally applied for the protection of the holder of the equity of redemption in all cases in which he has become the assignee of the mortgage.[1]

11. Bolton *v.* Ballard[2] was decided in Massachusetts in 1816. In that case the owner of an equity of redemption conveyed the premises in fee, the grantee agreeing to pay to the mortgagee the amount due on the mortgage, and the balance of the purchase money to the grantor, all of which was done accordingly. It was held that the widow of the grantor was entitled to dower in the premises. The court said: "It can not be denied that if Savage Bolton (the grantor) had paid off the mortgage the day before he conveyed to Ballard, her claim would be maintained, for in that case the incumbrance being removed, he would have been restored to an indefeasible estate in fee, and his seizin would have been perfect. Now by the facts agreed, it appears that part of the bargain with Ballard was, that he should pay off the mortgage; and a sufficient amount of the purchase money was appropriated to that object. The money was in fact paid, and the bond discharged on the very day the conveyance was made to Ballard; so that Bolton might, according to the terms of his deed, have conveyed an unincumbered estate to him. It is not stated whether the payment or the delivery of the deed had precedence in point of time. But to execute the real intention of the parties, it must be supposed that the incumbrance was first removed. Then Savage Bolton was seized so as to vest a right of dower in his wife; and although, in one view, this may be considered a seizin for an instant; yet it is to be taken in connection with the former seizin, which, although affected by the rights of the mortgagee, was always in force against every other person. And when those rights ceased to exist, the estate was as if it had never been incumbered." The court distinguished the case from Popkin *v.* Bumstead, upon the ground that in that case the widow had joined in the mortgage and released her dower, while in the case before them, the husband became the owner of the lands subject to the mortgage, and the demandant had never released.

It will be observed, however, that in Bolton *v.* Ballard, the court

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[1] The authorities upon this point are collected post, §§ 29–36. See, also, 1 Hilliard on Mortg. ch. 18.

[2] Bolton *v.* Ballard, 13 Mass. 227.

treat the transaction precisely as if the whole purchase money had been paid to the husband and he had thereupon satisfied the mortgage. With respect to such satisfaction, therefore, the purchaser, through whose hands the money passed, was regarded as the mere agent or instrument of the husband, and not as making the disbursement in his own right or from his own funds. Upon this view it was clear the widow was under no obligation to make contribution.

12. It was upon this principle that the Supreme Court of Ohio decided the case of Carter *v.* Goodin.[1] In that case, the vendees of real estate, in compliance with the terms of their contract, and in payment of part of the purchase money, satisfied a subsisting mortgage given by the vendor, in which the wife of the latter had joined. It was held that she was dowable of the lands. The court said: "Carter by his contract with them, (the vendees,) provided for the application of a part of the purchase money coming to him in discharge of a balance of his liability to Wister, (the mortgagee.) And when the application was made, Wister released and discharged the mortgage. The money, therefore, which was applied in satisfaction of the debt, was the property of Carter, and not that of Grandin & Gwynne. And Carter suffered no default. He discharged the debt before condition broken, and before Wister had acquired any right to enforce the mortgage as the security for his debt. There was plainly no intention to give Grandin & Gwynne any right or interest under the mortgage, as it was released on the payment of the debt, instead of being transferred. . . . It is true that the debt was paid and the mortgage discharged after Carter had sold and conveyed to Grandin & Gwynne. But the amount paid by Grandin & Gwynne to Wister on the mortgage, was in reality a payment by them to Carter. It was a part payment of the purchase money coming to Carter. It was a compliance with a stipulation in their contract with Carter, by which his liability to Wister was extinguished. The money, therefore, thus paid by Grandin & Gwynne, was paid for Carter's use, and in satisfaction of his own debt, in the manner required by him. I know of no ground upon which Grandin & Gwynne can, under these circumstances, claim to be subrogated to the rights of Wister in the mortgage, and to acquire an interest in the premises under a mortgage, the condition of which even was never broken."

For the reasons thus clearly and emphatically expressed, it is

[1] Carter *v.* Goodin, 3 Ohio State, 75, 78.

plain that the cases of Bolton *v.* Ballard and Carter *v.* Goodin in nowise contravene the general doctrine, that where a purchaser under the husband has removed an incumbrance valid against the wife, she must contribute to its redemption. Both those cases proceeded upon the ground that the husband, and not the purchaser, had satisfied the mortgages there in controversy.

13. In Wedge *v.* Moore,[1] the owner of lands had executed three different mortgages, his wife joining in the second, only. The third mortgagee took possession of the premises under his mortgage, and paid and procured to be discharged the two prior mortgages, without the knowledge or consent of the mortgagor, and conveyed the whole premises to the tenant by a deed with general warranty. It was held that the widow was entitled to dower in the entire premises. The release of dower, in the opinion of the court, was incident to the estate conveyed in mortgage, and when the mortgage in which the wife had joined was defeated by the payment of the debt, the release of dower fell with it, and was avoided as if it had never been made. The court added: "The only circumstance relied on to obviate the conclusion from these plain propositions is, that the mortgage was paid and the discharge of the mortgage procured by the tenant. This, we think, can make no difference. He took his conveyance subject to that incumbrance, and it may be presumed that the consideration paid was less by the amount of that incumbrance, than he would otherwise have paid. He paid off the incumbrance to clear his own estate, and took a discharge. The tenant must either have agreed to pay off and discharge this mortgage, as part of the purchase, or, otherwise, he would, if evicted, have had a remedy, under his general or special warranty against the grantor, the demandant's husband. The fact that the tenant obtained a discharge of the mortgage, and did not take an assignment, leads to the conclusion, that he was to pay the mortgage himself, as, in effect, part of the purchase money. The tenant thus obtained all which his grantor's deed could give him, namely, the estate described, subject to the wife's inchoate right of dower."

14. Eaton *v.* Simonds[2] was a bill in equity. The complainant had joined with her husband in mortgaging a portion of his estate. The equity of redemption was afterwards sold to the defendant, on an execution issued against the mortgagor, and the defendant, during

[1] Wedge *v.* Moore, 6 Cush. 8.

[2] Eaton *v.* Simonds, 14 Pick. 98.

the lifetime of the mortgagor, having paid the amount due to the mortgagee, claimed an assignment of the mortgage; but the mortgagee declaring that an assignment would be unnecessary, the mortgage was discharged upon the margin of the record in the registry of deeds. It was held that this discharge was an extinguishment of the mortgage and not an equitable assignment; and that the widow was entitled to dower in the land free from the incumbrance of the mortgage. Wilde, J., in delivering the opinion of the court, disposed of the question arising upon the discharge of the mortgage, as follows: "But this discharge, the defendant's counsel contend, will operate as an equitable assignment, as it was so intended to operate by the parties; and that the union of the legal and equitable titles may well exist without producing the effect of a merger, or the extinguishment of the mortgage. Perhaps this might be so, if the discharge could be considered as an assignment of the mortgage. The general principle is, that when the purchaser of a right to redeem takes an assignment, this shall or shall not operate as an extinguishment of the mortgage, according as the interest of the party taking the assignment may be, and according to the real intent of the parties. Gibson *v.* Crehore, 3 Pick. 482. But Chief Justice Savage remarks in the case of Coates *v.* Cheever, 1 Cowen, 460: 'That the spirit of the cases seems to be this; that where the tenant in possession enters by virtue of a purchase from the mortgagor, then the subsequent purchase of the mortgage by him is an extinguishment.' And that case was decided upon that principle. The same principle is laid down in James *v.* Morey, 2 Cowen, 301, and in other cases. Forbes *v.* Moffatt, 18 Ves. 390; Gardner *v.* Astor, 3 John. Ch. R. 53. The rule at law is inflexible, that where a greater and a less estate meet and coincide in the same person, in one and the same right, without any intermediate estate, the less estate is immediately annihilated or merged; and the same rule applies to the union of the legal estate with the equitable interest. But this rule is not inflexible with courts of equity, but will depend on the intention and interest of the person in whom the estates unite. In the present case, however, the doctrine of merger is not applicable, for the estate in the mortgage of William Eaton was never assigned to the defendant, and never vested in him; so that it could not unite with the equitable title in him, so as to operate as a merger. But this mortgage has been legally discharged; the debt has been paid, and can no longer be set up as a subsisting title, either at law or in

equity. It makes no difference that the defendant was advised and supposed that a discharge of the mortgage would be equally beneficial to him as an assignment. This was a mistake, which, however, this court has no power to correct."[1]

15. The court were subsequently pressed with the argument that the widow was bound to contribute even if the mortgage were to be treated as not subsisting. The tenant had satisfied a mortgage in which the demandant had joined, and which, therefore, was a valid incumbrance upon her estate; and the obligation rested upon her, it was urged, to make contribution before she could entitle herself to dower.[2] The court avoided this point by distinguishing between a redemption during the husband's lifetime, and after his death, and holding that in the former case the obligation to contribute did not exist. "In the present case," they said, "the plaintiff clearly was not bound to contribute to the redemption of the first mortgage when it was paid off and discharged. This was done during the life of the husband, and clearly the wife then was not bound to contribute, and the husband was not bound to repay the mortgage debt, unless he saw fit to redeem the equity. The defendant, therefore, redeemed in his own right. He bought the equity subject to these mortgages, and there seems to be nothing inequitable in holding him bound to redeem them. In the case of Swaine *v.* Perine, 5 John. Ch. R. 482, it is decided by Chancellor Kent, that if the heirs pay a mortgage, the wife shall contribute as to the amount paid by the heirs, but that as far as the husband had reduced the mortgage in his lifetime, that was doubtless so far a reduction for the benefit of the wife as well as himself. *The same rule will hold where payment is made by the assignee of the husband during his lifetime;* and this is decisive in the present case."[3]

16. In the course of their opinion in the foregoing case the court comment upon the ruling in Popkin *v.* Bumstead in these terms: "We have, however, examined the cases cited by the defendant, but do not find that they impugn, in any respect, our former decision, excepting, perhaps, the case of Popkin *v.* Bumstead, 8 Mass. R. 491;

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[1] Eaton *v.* Simonds, 14 Pick. 98, 104. See, accord. Runyan *v.* Stewart, 12 Barb. 587.

[2] This proposition is succinctly and ably stated in an article in the Law Reporter, vol. xii. pp. 165, 167.

[3] Eaton *v.* Simonds, 14 Pick. 98, 107, 108. The correctness of the decision upon this point is doubted. See post, § 22 *et seq.*

and that is distinguished from this in an important particular. The defendant in that case had purchased of the administrator of the mortgagor, and thereby acquired the same rights which the administrator would have had if he had paid off the mortgage for the benefit of the heirs. The mortgage was paid off after the death of the mortgagor, when the widow's right of dower had become perfect, and it might therefore be supposed that she was not entitled to dower without contributing her share of the redemption money, and that the case came within the principle laid down in Gibson *v.* Crehore, that where several are interested in an equity of redemption, and one, only, is willing to redeem, he must pay the whole mortgage debt; and in such case he is, in a court of equity, considered as assignee of the mortgage, and as standing, after such redemption, in the place of the mortgagee, in relation to the other owners of the equity. Unless the case of Popkin *v.* Bumstead can be supported on some such distinction, it is difficult to perceive any legal or equitable ground on which it can stand. It is difficult, also, to say how that case could be decided on rules of equity, it being an action at law; but unless the principle of contribution does apply, the case seems opposed to the whole current of the authorities."[1]

17. In the case of Brown *v.* Lapham,[2] the facts were very complicated. The mortgage there in question had passed through many changes, and it was claimed by the widow of the mortgagor that in contemplation of law it had become fully satisfied. But upon a careful analysis of all the facts the court were of opinion that the mortgage debt had never been paid so as to let her in to her right of dower without redemption. That in order to such payment, so as to extinguish the mortgage, the debt must be paid by the husband, or out of the husband's funds, or by some person as personal representative, assignee, or person standing in some other relation, which, in legal effect, makes him mortgagor and debtor, and one whose duty it is to pay and discharge the mortgage debt. And it was further said that whether a given transaction shall be held, in legal effect, to operate as a payment and discharge which extinguishes the mortgage, or as an assignment which preserves and keeps it on foot, does not so much depend upon the form of words used, as upon the relations subsisting between the parties advancing the money, and the party executing the transfer or release, and their

[1] Eaton *v.* Simonds, 14 Pick. 98, 107.

[2] Brown *v.* Lapham, 8 Cush. 551.

relative duties. If the money is advanced by one whose duty it is, by contract or otherwise, to pay and cancel the mortgage, and relieve the mortgaged premises of the lien, a duty in the proper performance of which others have an interest, it will be held to be a release and not an assignment, although in form it purports to be an assignment. When no such controlling obligation or duty exists, such an assignment will be held to constitute an extinguishment or an assignment, according to the intent of the parties; and their respective interests in the subject will have a strong bearing upon the question of such intent. The court conclude their opinion with the following observations: "If it be suggested, that upon the assignment of the mortgage to Plunkett and Brayton, who had the equity of redemption as assignees, there was a union of titles which constituted a merger and extinguished the mortgage, the answer is plain, founded on a well-settled rule of law, that when any right, estate or interest intervenes between the particular and general estate, which are thus united, no coalescence takes place, but each remains distinct. If the plaintiff had the right of dower claimed, it was a real interest in the estate intervening between the mortgage and the general right of redemption, which prevented a merger by the union of these titles."[1]

18. The principle requiring a widow to contribute was applied in Niles *v.* Nye,[2] under somewhat peculiar circumstances. In that case Nye mortgaged two parcels of real estate, one to Waldo, and the other to a life insurance company, his wife joining in both mortgages. The equity of redemption in both parcels was afterwards conveyed to Green, who subsequently mortgaged it to Niles, the plaintiff. After the death of Nye, the first mortgagor, his heir took an assignment of the mortgages made to Waldo and the insurance company, and set off to the widow dower in the entire premises, as if they were unincumbered. On a bill in equity brought by Niles against the widow and heir praying to be permitted to redeem the first two mortgages, and to have the assignment of dower set aside, it was held that he was not bound by the assignment; that the widow had no right of dower as against him without contributing her portion towards the redemption of the two mortgages; and that he had a right to redeem those mortgages on paying what was due thereon, and to have them assigned to himself.

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[1] Brown *v.* Lapham, 8 Cush. 551, 557.

[2] Niles *v.* Nye, 18 Met. 185.

19. In Cass *v.* Martin,[1] the grantee of lands held them subject to a mortgage for the purchase money. After his death his administrator sold the lands to the defendant under an order of the probate court. The purchaser subsequently satisfied the mortgage. It was held that the widow of the mortgagor must make contribution in order to entitle herself to dower. This case is directly opposed to Hitchcock *v.* Harrington,[2] in so far as the latter case allowed dower without requiring the widow to contribute; it is nevertheless in accordance with the current of authority.

20. The widow must also contribute where the lands in which she claims dower are subject to a charge created by deed or will. This rule was applied in Clough *v.* Elliott,[3] where the husband of the demandant took the lands by devise, charged with a certain provision for the support of his mother; and in Copp *v.* Hersey,[4] where the estate was subject to a charge of a similar character.

21. The rule exacting contribution from the widow where a person deriving title through her husband has redeemed the lands from a mortgage binding upon her interest, as a condition upon which she may be let in to her dower, is firmly established in numerous decisions made in the courts of the various States.[5] In some of the States this rule has been embodied in a statutory form. Thus, the Massachusetts act, after giving dower in mortgaged premises as against every person but the mortgagee and those claiming under him,[6] provides as follows:—

If the heir or other person claiming under the husband, redeems the mortgage, the widow shall either repay such part of the money paid by him as shall be

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[1] Cass *v.* Martin, 6 N. H. 25.

[2] Hitchcock *v.* Harrington, 6 John. 290; ante, § 2.

[3] Clough *v.* Elliott, 3 Foster, 182.

[4] Copp *v.* Hersey, 11 Foster, 317.

[5] Pynchon *v.* Lester, 6 Gray, 314; McCabe *v.* Bellows, 7 Gray, 148; Niles *v.* Nye, 13 Met. 135; Newton *v.* Cook, 4 Gray, 46; Wheeler *v.* Morris, 2 Bosw. 524; Bell *v.* Mayor of New York, 10 Paige, 49; House *v.* House, Ibid. 158; Evertson *v.* Tappen, 5 John. Ch. 497; Russell *v.* Austin, 1 Paige, 192; Swaine *v.* Perine, 5 John. Ch. 482; Cass *v.* Martin, 6 N. H. 25; Rossiter *v.* Cossit, 15 N. H. 38; Adams *v.* Hill, 9 Foster, 202; Clough *v.* Elliott, 3 Foster, 182; Hastings *v.* Stevens, 9 Foster, 564; Mills *v.* Van Voorhis, 23 Barb. 125; Mantz *v.* Buchanan, 1 Md. Ch. Decis. 202; Woods *v.* Wallace, 10 Foster, 384; Copp *v.* Hersey, 11 Foster, 317; Carll *v.* Butman, 7 Greenl. 102; Simonton *v.* Gray, 34 Maine, 50; Watson *v.* Clendenin, 6 Blackf. 477; Wheatley *v.* Calhoun, 12 Leigh, 264; Moore *v.* Rollins, 45 Maine, 493; Barbour *v.* Barbour, 46 Maine, 9; Wilkins *v.* French, 20 Maine, 111; Robinson *v.* Leavitt, 7 N. H. 104.

[6] Ante, ch. 22, § 14.

equal to the proportion which her interest in the mortgaged premises bears to the whole value thereof; or she shall, at her election, be entitled to dower only according to the value of the estate after deducting the money paid for the redemption thereof.[1]

Provisions of like import are contained in the statutes of several of the other States.[2]

Whether the widow is required to contribute where the mortgage is redeemed in the husband's lifetime.

22. It is a question of considerable importance whether a widow is bound to contribute before claiming dower, where a mortgage incumbrance has been redeemed by a purchaser during the lifetime of her husband. The author of a recent valuable work on the Law of Real Property, maintains that no such obligation exists on her part. He says: "During the lifetime of the husband, the wife is not bound to contribute towards the redemption of the mortgage, and is not, therefore, to be charged therewith, whoever may redeem. But upon her husband's death, she takes her interest in the estate, if at all, charged with the mortgage, and if any one interested in the estate, as heir or purchaser, discharge or redeem the mortgage, he thereby acquires an equitable lien upon the estate, which he may hold against the widow till she contributes her proportion of the charge according to the value of her interest."[3] In the first proposition above stated by the learned author he is clearly and explicitly sustained by the case of Eaton *v.* Simonds,[4] referred to by him. But it is not so clear that he is supported by the cases of Wedge *v.* Moore[5] and Smith *v.* Stanley,[6] cited to the same point.[7] In Wedge *v.* Moore, the payment was made without the knowledge or consent of the husband by a junior *mortgagee* who had gone into possession under his mortgage. The tenant in possession occupied under a conveyance from this mortgagee. In Smith *v.* Stanley, the mortgage in which the wife had

[1] Gen. Stat. Mass. (1860,) p. 469, § 2; Rev. Stat. Mass. 1836, p. 409, § 2.

[2] Rev. Stat. Maine, 1840–41, p. 393, § 15; 2 Comp. Laws Mich. 1857, p. 851, § 6; Verm. Rev. Stat. 289; Wis. Rev. Stat. 333; Ark. Rev. Stat. 337, 445, 446; Stat. Minnesota, Rev. 1858, 408, § 6. And in the District of Columbia; Rev. Code Dist. Col. 1857, p. 200, § 3.

[3] 1 Washb. Real Prop. 186, § 21. See, also, p. 188, § 23.

[4] Eaton *v.* Simonds, 14 Pick. 98, 107; ante, § 15.

[5] Wedge *v.* Moore, 6 Cush. 8; ante, § 13.

[6] Smith *v.* Stanley, 37 Maine, 11; post, § 47.

[7] In § 23, p. 188.

joined was released by the mortgagee and new notes and a new mortgage were taken from a purchaser from the husband. The estate in this case was not relieved by any person claiming under the husband, but by the creditor himself; and in neither of these cases was stress laid on the fact that the transactions took place in the lifetime of the husband.

23. Eaton *v.* Simonds, in which it was held by the Supreme Court of Massachusetts that a widow is not bound to contribute where a mortgage is redeemed in the lifetime of her husband, was decided before the passage of the Revised Statutes of that State. The distinction there taken is expressly repudiated in the subsequent case of Newton *v.* Cook,[1] determined after those statutes went into operation. In that case a husband, who, before his marriage, had mortgaged land to a guardian for the benefit of the wards of the latter, afterwards became insolvent, and his assignee sold the land. The purchaser executed a new mortgage to the wards to secure a like amount, and the guardian discharged the first mortgage upon the record, pursuant to an express agreement that the mortgage to the wards should be substituted for that to the guardian. The purchaser of the right of the husband afterwards sold the land, and his grantee redeemed the mortgage before the husband's death. Under these circumstances it was claimed that the widow of the first mortgagor was entitled to dower as of an unincumbered estate, and Eaton *v.* Simonds was relied on in support of this claim. But the court held that she was dowable of the equity of redemption only. Eaton *v.* Simonds, they said, was decided before the passage of the statute then in force, and could not have been decided as it was under Rev. Sts. c. 60, § 2. This ruling was followed in Pynchon *v.* Lester,[2] where, as in Newton *v.* Cook, satisfaction of the mortgage was made in the husband's lifetime, and it was held that the widow took her dower in the land subject to the mortgage. The same doctrine was held in Maine in the case of Barbour *v.* Barbour.[3] The mortgage was satisfied in that case by the grantee of the demandant's husband more than twenty years before the death of the latter. The court, while approving the reasoning in Wedge *v.* Moore,[4] nevertheless held that, under their statute, which is substantially the same as

[1] Newton *v.* Cook, 4 Gray, 46.
[2] Pynchon *v.* Lester, 6 Gray, 314.
[3] Barbour *v.* Barbour, 46 Maine, 9.
[4] Wedge *v.* Moore, 6 Cush. 8; ante, § 13.

that of Massachusetts, the widow must either contribute, or take dower in the land according to its value after deducting the amount of the mortgage debt.

24. If the provisions of the statutes of Massachusetts and Maine relating to the matter of contribution by the widow, are to be understood as merely embodying the general doctrine prevailing in courts of equity, and not as introducing a new or different rule, then the cases above referred to would seem to establish precisely the converse of the proposition stated by Mr. Washburn. Those cases, and that of Eaton *v.* Simonds, appear to be the only reported cases bearing directly upon the question. In Carll *v.* Butman,[1] it is not distinctly stated when the mortgage was released, whether before or after the death of the husband, but from the facts as reported, it would seem to have been in the husband's lifetime. The widow, nevertheless, was required to contribute. And unless some technical rule should interfere to prevent it, it is difficult to perceive any sufficient reason why the principle requiring a dowress to contribute should not be applied as well where the incumbrance is redeemed in the lifetime of the husband, as where the redemption occurs after his death. The equity of the purchaser, upon which this principle is founded, appears to be as strong in the one case as in the other.

Principal or interest of the mortgage debt must be payable before contribution can be required.

25. It has already been shown that the mortgagee can not interfere with the endowment of the widow of the mortgagor, until he is entitled to demand a sale of the mortgaged premises; or in other words, until the mortgage debt, or some part of it, has matured.[2] Upon the same principle, the heir, or other person deriving title under the husband, can not insist upon contribution by the widow until the principal debt, or some part of it, or the interest accruing thereon, becomes payable; and then only to the extent of her proportion of the amount which has actually become due. If, therefore, no part of the debt—principal or interest—becomes payable during the lifetime of the widow, she will escape entirely all liability for contribution. In the case of Danforth *v.* Smith,[3] Redfield, J.,

[1] Carll *v.* Butman, 7 Greenl. 102; post, § 32. [2] Ante, ch. 23, § 1.
[3] Danforth *v.* Smith, 23 Verm. 247, 259.

has the following observations upon this point: "The general rule of equity is, that all the estates concerned, whether defined by quantity of interest and duration, or by extent of territory, shall contribute according to their relative value at the time the contribution becomes obligatory, which is, when the debt falls due; for until that, there is no power to compel payment, or contribution. If this mortgage did not become due for thirty years, or the interest, it might be very unequal for the dowress to throw the whole burden upon the owner of the reversion or remainder; but I do not see how, upon general principles of equity, such a result could be avoided. The probate court might have some control over the matter, in making the assignment; but I do not see how it could be done in a court of equity before anything was due. The tenant for life must be allowed quietly to enjoy the estate, I think. But when the debt becomes due, so that a right to have it apportioned accrues, the estates must bear the burden, according to their relative value at that time." But if the interest be payable during the time the principal debt has to run, or if the principal be due and the creditor do not desire to enforce payment, in either case the widow must contribute her part towards keeping down the accruing interest.[1]

Extent to which the widow must contribute.

26. The principle upon which a dowress must contribute to the redemption of a mortgage incumbrance upon lands in which dower is claimed, is thus stated by the chancellor, in Swaine *v.* Perine:[2] "How is the plaintiff to contribute ratably to discharge the mortgage debt? If she was to pay one-third of the debt and interest (exclusively of costs) paid by the defendant, together with interest on that one-third, from the time the defendant paid it, there could be no doubt that this would be, to the defendant, a satisfactory contribution. But the plaintiff has only a life interest in the dower, and payment of the entire one-third of that debt would be unjust. It would be making her pay for a life estate, equally as if it was an estate in fee. The more accurate rule would appear to be that she should 'keep down' one-third of the interest of the mortgage debt, by paying, during her life, to the defendant, the interest of one-third part of the aggregate amount of the principal and interest of the

[1] Post, § 27; Bell *v.* Mayor N. Y., 10 Paige, 49, 71.

[2] Swaine *v.* Perine, 5 John. Ch. 482.

mortgage debt paid by the defendant, to be computed from the date of such payment. But as it would be inconvenient and embarrassing to charge her with such an annuity, then let the value of such annuity from the plaintiff (her age and health considered) be ascertained by one of the masters of the court, and be deducted from the amount of the rents and profits so coming to her; and if that value should exceed the amount of the rents and profits so coming to her, that then the residue of such value be deducted from the dower to be assigned to her, out of the house and land mentioned in the bill. The question is, if an estate in fee, in one equal third part of the premises, ought to pay the one equal third part of the mortgage debt and interest paid by the defendant, then what proportion ought the plaintiff's life estate, in that one-third part, to pay? I apprehend the value of such an annuity would be that result."[1]

27. The following, from the opinion of Chancellor Walworth in Bell *v.* The Mayor of New York,[2] is upon the same subject: "Where the widow is entitled to dower in an equity of redemption, and the mortgagee does not wish to enforce payment of the principal of his debt, the rule is, that as between her and the heir, or other owner of the equity of redemption, she must contribute sufficient to keep down one-third of the interest on the amount due." It will be perceived that the mode of apportionment here suggested relates to a case where the mortgage is not redeemed, but is still outstanding; and where, by reason of forbearance of the mortgagee, payment of the accruing interest, only, of the mortgage debt is to be provided for. In House *v.* House, the rule in such case was stated in similar terms: "It is stated in the bill, and admitted in the answer, that the two mortgages upon the grist-mill were given to secure the payment of the purchase money. In relation to that portion of the property she takes her dower subject to the mortgages. She must, therefore, keep down one-third of the interest from the time of her husband's death, upon the amount of principal and interest then unpaid, until the mortgages are required to be paid off; and then she must contribute towards such payment, a sum which will be equal to the then value

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[1] Swaine *v.* Perine, 5 John. Ch. 482. 493: accord. Evertson *v.* Tappen, Ibid. 497, 513; approved in Gibson *v.* Crehore, 5 Pick. 146, 152; Cass *v.* Martin, 6 N. H. 25, 26; Rossiter *v.* Cossit, 15 N. H. 38, 43; Clough *v.* Elliott, 3 Foster, 182, 188; Woods *v.* Wallace, 10 Foster, 384, 388; Hartshorne *v.* Hartshorne, 1 Green's Ch. 349, 359.

[2] Bell *v.* The Mayor of New York, 10 Paige, 49, 71.

of an annuity of the amount of one-third of the interest upon the sum unpaid at her husband's death, for the residue of her life."[1]

28. In a case that arose in Vermont, the following points were determined. 1. In Vermont, probate courts have exclusive jurisdiction of the assignment of dower; and if the dowress claim a special rule of apportionment, the probate court can alone establish such rule in her favor. But if that court assign dower generally, in an equity of redemption, without determining the proportion the widow shall contribute, it is equivalent to saying that it shall be in proportion to her estate. A court of chancery, upon a bill brought by the dowress to redeem, has jurisdiction to determine the proportion she should contribute, upon the general rule of equity in such cases, except so far as the parties may have varied that rule, by an agreement executed at the time. 2. The mere fact that the estate has been purchased subject to the incumbrance and to dower, is not sufficient to raise any special rule of apportionment, varying from the ordinary rule in equity. 3. The general rule of equity is, that all the estates concerned, whether defined by quantity of interest and duration, or by extent of territory, shall contribute according to their relative value when the contribution becomes obligatory; that is, when the debt falls due. 4. According to this rule, when a widow is endowed of an equity of redemption, one-third of the incumbrance should be placed upon the land covered by the dower, and the remainder upon the residue of the land covered by the incumbrance. 5. But it is competent for the dowress, the mortgagee, and the purchaser of the equity of redemption, to agree upon a different mode of apportionment; and if they agree, although by parol, that all of the incumbrance, except a certain part, shall be paid from that portion of the mortgaged premises not covered by the dower, this agreement, when executed, is irrevocable, and a court of chancery will regard it, in apportioning the residue of the incumbrance between the dowress and the purchaser.[2]

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[1] House *v.* House, 10 Paige, 158, 164.

[2] Danforth *v.* Smith, 23 Verm. 247.

Rule where the holder of the equity has procured an assignment of the mortgage.[1]

29. In the preceding chapter, the relative rights and obligations of the mortgagee and the dowress, where the former has become the owner of the equity of redemption, are stated and discussed.[2] We come now to the consideration of questions arising where the owner of the equity of redemption, subsequently to the acquisition of that estate by him, has procured to himself an assignment of the mortgage.

30. The Court of Errors and Appeals of New Jersey, in passing upon the right of dower as against a mortgagee who had acquired the equity of the mortgagor, remarked that there was nothing in the case before them which made it necessary to decide whether one who holds the equity of redemption by conveyance, mediate or immediate from the husband, can protect himself from dower by the *subsequent* purchase of a prior mortgage.[3] These observations fairly imply that, in the opinion of the court, there might be a distinction as to the rights of the respective parties in the two classes of cases. On the other hand, in New Hampshire, in a case similar to that determined in New Jersey, it was said of the assignee of a mortgage, who had also become the owner of the equity of redemption, that "he stood in the same position, and had the same rights which he would have had if he had first purchased the equity of redemption, and afterwards had paid the amount of the mortgage, or had taken an assignment of it. In either case, he would be, in equity, and in law, the purchaser and owner of the mortgage by way of redemption."[4] And it will be noticed as we proceed, that some courts have acted upon the idea that a distinction existed; while others have proceeded upon the assumption that both classes were governed by the same general rules, and subject to the same general principles.

31. In Gibson *v.* Crehore,[5] the equity of redemption of a mortgage

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[1] As to the doctrine of the English equity courts, which permits a purchaser from the husband to protect his estate against dower, by procuring an assignment to trustees of a prior mortgage term for years, and its inapplicability in this country, see ante, ch. 23, § 3, note 2.

[2] Ante, ch. 23, §§ 13–21.

[3] Thompson *v.* Boyd, 2 Zab. 543, 551; ante, ch. 23, § 15.

[4] Woods *v.* Wallace, 10 Foster, 384, 387.

[5] Gibson *v.* Crehore, 3 Pick. 475.

in fee was sold by the administrators of the mortgagor. The purchaser paid off the mortgage debt and took an assignment of the mortgage. It was insisted on behalf of the widow of the mortgagor that the payment thus made operated to satisfy the mortgage; that the assignment was mere matter of form; and that the law would give it no other operation than as evidence of payment and discharge of the mortgage. Upon this point, the court said: "No doubt it (the assignment) has this effect against the mortgagee himself; he has received his debt, and can have no further claim; but the question seems to be, whether the interest of the assignee can be preserved against the widow claiming her dower, she having once relinquished it; and the authorities are very satisfactory upon this point. When the purchaser of a right to redeem takes an assignment, this shall or shall not operate as an extinguishment of the mortgage according as the interest of the party taking this assignment may be, and according to the real intent of the parties. Now the interest of the defendant is altogether in upholding the mortgage, and it must have been his intent so to do, or this form of transaction would not have been adopted." The foregoing suit was brought in a court of law. On a bill to redeem subsequently brought by the widow against the same defendant, in a court of equity, the above doctrine was reaffirmed; and it was further held that if the assignee insisted upon it, she must redeem the whole debt in the same manner and upon the same terms as if he were not the owner of the equity. "If the defendant had *redeemed* the mortgage," the court said, "the plaintiff would have been let in by contributing her portion of the mortgage debt, according to the value of her life estate in one-third part of the mortgaged premises, in conformity with the rule adopted in the case of Swaine *v.* Perine, 5 John. Ch. R. 482. But as the defendant, being *assignee* of the mortgage, insists on the payment of the whole mortgage debt, the plaintiff can not redeem on any other terms. After redemption she will hold as assignee of the mortgage, but will be bound to keep down one-third of the interest during her life, and may hold over for the residue of the mortgage debt."[1]

32. The doctrine of Gibson *v.* Crehore was followed in Carll *v.* Butman,[2] except that in the latter case the dowress was not required

[1] Gibson *v.* Crehore, 5 Pick. 146. See ante, ch. 23, §§ 13–21.

[2] Carll *v.* Butman, 7 Greenl. 102.

to redeem the entire debt. The facts were as follows: one Holmes mortgaged a tract of land to Jones, and subsequently conveyed one acre out of the tract to Carll, husband of the demandant. Carll afterwards conveyed the acre in question to the defendant, his wife not joining, and the defendant thereupon procured a release of the mortgage from Jones, the mortgagee. In support of her claim for dower, it was insisted by the demandant that the release to the defendant by the mortgagee, operated, not as an assignment, but as an extinguishment of the mortgage. The court held that the mortgage was to be treated as still subsisting, and that the widow must contribute to its redemption. "The sum paid to the mortgagee," they remarked, "was the tenant's own money. It was not paid with a view to extinguish the mortgage, or to pay the debt due thereon, but to purchase the land after the right to redeem was understood to be foreclosed. To regard this purchase as an extinguishment of the mortgage, would be to give a construction to the deed which neither party could have intended." And in conclusion, they added: "But if she would have her dower, she must pay her just proportion of the sum due on the mortgage. As the value of the whole tract mortgaged, is to the whole sum due on the mortgage, so would the value of the acre of which the husband was seized, be to the amount which that acre should contribute. And of this last sum thus ascertained, the widow would be holden to pay the proportion which the present value of an annuity for her life, equal to one-third of the rents and profits, might bear to the value of the whole acre in which she has a claim to be endowed."[1] The same principle was applied in the case of Simonton *v.* Gray,[2] where the doctrine was thus stated: "If the purchaser of an equity of redemption take an assignment of the mortgage, both estates may stand, though united in the same person. When substantial justice may be promoted, the mortgage will be upheld, or not, according to his intention or his interest. For mergers are not favored in courts of law or in courts of equity. In the case at bar it is for the interest of the purchaser of the equity of redemption, and of those claiming under him, that the mortgage should be upheld against the incumbrance of dower. It would not comport with just principles of law or equity, that after uniting with her husband, and releasing her right, the plaintiff should have dower

[1] See Wilkins *v.* French, 20 Maine, 111.

[2] Simonton *v.* Gray, 34 Maine, 50.

in that estate. But she is entitled to dower in the equity of redemption, to which her release, and the subsequent conveyance by her husband present no bar; and she can, therefore, redeem the estate. According to the agreement of the parties, a master will be appointed to ascertain the value of her estate in gross, and the annual value. As she must keep down one-third of the interest on the amount due upon the mortgage, the yearly value of her estate will be found by deducting from one-third of the net annual income of the whole estate one-third of the annual interest on the amount of the mortgage debt due. The master will ascertain the value of the net annual income of the whole estate; the amount due upon the mortgage at the date of the demand of dower, and the probable duration of the life of the complainant. From these elements the required results may be readily determined. The sum to be paid to her, for the release of her estate, will be the present worth of an annuity during her life, equal to the net annual value of such estate."[1]

33. In a previous chapter, reference is made to Woods *v.* Wallace,[2] and copious extracts are given from the opinion delivered in that case. It was there held that a mortgagee who, subsequently to the date of the mortgage, becomes the owner of the equity, stands in the same position as a purchaser of the equity who afterwards procures an assignment of the mortgage; and that the rights of the dowress are identical in both cases. But the court ignored the doctrine of Gibson *v.* Crehore, in so far as it imposes upon the widow in such a case the necessity of redeeming the entire mortgage;[3] deeming it sufficient to require her to contribute her fair proportion of the debt, in this respect applying the rule adopted in Carll *v.* Butman.[4] They regarded it as an idle ceremony, and contrary to well-considered decisions, to exact full payment from the dowress, when the defendant would be entitled to regain his interest in the premises immediately, by refunding to her his share. So the Chancellor of New Jersey, in a case in which the purchaser of the equity had taken an assignment of the mortgage, decreed dower to the widow of the mortgagor upon condition that she kept down one-third the interest of the mortgage debt.[5]

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[1] Simonton *v.* Gray, 34 Maine, 50, 51; accord. Moore *v.* Rollins, 45 Maine, 493, 495; Barbour *v.* Barbour, 46 Maine, 9.

[2] Woods *v.* Wallace, 10 Foster, 384; ante, ch. 23, § 19.

[3] Gibson *v.* Crehore, 5 Pick. 146; ante, § 31.

[4] Carll *v.* Butman, 7 Greenl. 102; ante, § 32.

[5] Hartshorne *v.* Hartshorne, 1 Green's Ch. 349, 359.

34. Russell *v.* Austin[1] was a case in which the owner of an equity of redemption took an assignment of the mortgage after the death of the mortgagor, expressly to protect himself against dower to the extent of the incumbrance. By the chancellor: "There was no merger of the mortgage in this case by the assignment to Corning, or by the assignment from Corning to the defendant. In the case of James *v.* Morey,[2] the Court of Errors decided that the question of merger depended on the intention of the person who took the assignment of an outstanding title or estate, provided he had any interest in keeping up the incumbrance, and preventing a merger thereof in his prior estate. At the time of the assignment of the mortgage in this case, the husband was dead, and the wife's right of dower in the premises had become complete. The mortgage was purchased in and assigned instead of being paid off, under the advice of counsel, and for the avowed object of protecting the assignee against the claim of dower, to the extent of that incumbrance. There can, therefore, be no pretence that the mortgage interest was merged by the assignment to Corning, or by the sale and assignment to the defendant, when it was still kept on foot for the same purpose. The widow is only entitled to dower in the equity of redemption, and must contribute her share towards the payment of the mortgage."

35. In the case of Evertson *v.* Tappen,[3] an executrix suffered land of which her husband, the testator, died seized, subject to a mortgage, to be sold under the mortgage, and became the purchaser, and sold it as her property. The chancellor held that an executor or trustee can not buy in land of the testator on a sale under an incumbrance, for his own benefit, and therefore that she was liable to account to the heirs for the proceeds of the sale. He further held, however, that as the widow of the testator, she was dowable of the proceeds of the sale made by her, subject to a ratable contribution towards the extinguishment of the mortgage debt, upon the principle adopted in Swaine *v.* Perine.[4]

36. In the following case, decided in Massachusetts, the dowress, owing to peculiar equities existing in her favor, was exonerated from liability to make contribution. Nathan Stratton executed to one Hapgood a mortgage on two parcels of land to secure the payment

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[1] Russell *v.* Austin, 1 Paige, 192.

[2] James *v.* Morey, 2 Cowen, 246.

[3] Evertson *v.* Tappen, 5 John. Ch. 497.

[4] Swaine *v.* Perine, 5 John. Ch. 482; ante, § 26.

of a debt due the latter. In both these parcels Sarah Stratton was entitled to dower. Afterwards Stratton, the mortgagor, conveyed one of the parcels, subject to the mortgage, to one Harwood. Sarah Stratton united in this conveyance, and released to Harwood her dower interest in the premises so conveyed to him. In consideration of this release, Stratton, the mortgagor, leased the other parcel of the mortgaged premises to her for her life, and she entered upon the possession and enjoyment thereof. Upon the question whether, under these circumstances, she was bound to contribute towards relieving the premises leased to her, from the incumbrance, Wilde, J., said: "It is no doubt true generally, that a tenant for life, in possession of an estate charged with a mortgage, is bound to keep down the interest, or to assist the reversioner in redeeming the mortgage; but under all the circumstances of this case, we think that Sarah Stratton is not thus liable. She, not having joined in the mortgage, would have been entitled to dower in the whole of the mortgaged premises, but for her subsequent release to Abner Harwood. In consideration of that release, the demanded premises were leased to her for life, as an equivalent for her right of dower in the whole of the mortgaged premises, and it has not been denied that it was a fair equivalent, and that the conveyance to her was made *bona fide*. This freehold estate was never intended to be subject to the mortgage. Abner Harwood was bound to pay the whole debt if he chose to redeem, and if he did not redeem, the mortgagee could not have defended against Sarah Stratton's claim of dower. It is clear, therefore, that she is entitled to hold the demanded premises free from the mortgage."[1]

In what States the widow may elect to contribute, or have the mortgage debt deducted from the value of the land.

37. In Massachusetts,[2] Maine,[3] and the District of Columbia,[4] where the heir or other person claiming under the husband redeems the incumbrance, the widow may contribute her proportion of the

[1] Brooks *v.* Harwood, 8 Pick. 497, 499.

[2] Gen. Stat. Mass. (1860,) p. 469, § 2; Rev. Stat. Mass. (1836,) p. 409, § 2; Henry's case, 4 Cush. 257; Newton *v.* Cook, 4 Gray, 46; Pynchon *v.* Lester, 6 Gray, 314.

[3] Rev. Stat. Maine, (1857,) p. 606, § 14; Rev. Stat. Maine, (1840–41,) p. 393, § 15; Barbour *v.* Barbour, 46 Maine, 9.

[4] Rev. Code Dist. Col. 1857, p. 199, § 3.

money paid for the redemption, and entitle herself to dower in the whole lands; or she may, at her election, take dower only "according to the value of the estate after deducting the money so paid for the redemption thereof." In Michigan,[1] Vermont,[2] Wisconsin,[3] Arkansas,[4] and Minnesota,[5] it is provided that where a mortgage is redeemed by the heir or other person claiming under the husband, "the amount so paid shall be deducted from the value of the land, and the widow shall have set out to her for her dower in the mortgaged lands, the value of one-third of the residue after such deduction." And in a case determined in South Carolina, it was held that if money be assessed in lieu of dower in mortgaged premises, the amount of the incumbrance should be deducted from the fee simple value, and the assessment made on the balance.[6] Enactments of this description are held to apply to all cases where the death of the husband occurs after they took effect, though the mortgage were redeemed before that time.[7]

As against a holder of the equity of redemption who fails to redeem, the widow may be endowed as of an unincumbered estate.

38. This point was first mooted by Chief Justice Kent, in Hitchcock *v.* Harrington,[8] where, in refusing to permit the tenant to avail himself of a satisfied mortgage in bar of the demandant's right of dower, he added these observations: "The same principle ought, perhaps, equally to estop him from setting up an existing mortgage, because we now regard the mortgage estate only for the benefit of the mortgagee and his assigns. As to the rest of the world, so long as it is not put in force, it is only a pledge or lien on the land, with which they have no concern any further than not to disturb it. The objection, then, to the demandant's right to recover totally fails." In the case of Collins *v.* Torry,[9] determined soon afterwards, this point was distinctly met and decided. The court said: "He (the tenant)

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[1] 2 Comp. Laws Mich. 1857, p. 851, § 6.
[2] Verm. Rev. Stat. 289, § 8; Comp. Stat. Verm. p. 862, § 8.
[3] Wis. Rev. Stat. 333, § 6; Rev. 1858, p. 565, § 6.
[4] Ark. Rev. Stat. 337, 445, 446.
[5] Stat. Minn. Rev. 1858, p. 408, § 6.
[6] Stoppelbein *v.* Shultz, 1 Hill, S. C. 200.
[7] Barbour *v.* Barbour, 46 Maine, 9.
[8] Hitchcock *v.* Harrington, 6 John. 290, 295.
[9] Collins *v.* Torry, 7 John. 278, 282.

shows no title under the mortgage; and he can not, therefore, set it up to defeat the widow's dower. A mortgage, before foreclosure or entry, is not now regarded as a legal title which a stranger can set up. It can only be used by the mortgagee and his representatives. This does, in effect, enable the wife to be endowed of an equity of redemption; and, under the above limitations, it is just and consistent with principle that she should be endowed of it. . . . . The plain and necessary rule is, to allow her the dower, which she must take as the heir or purchaser takes the estate, subject to the mortgage." This principle has been frequently reaffirmed in adjudged cases, and is regarded as a settled point in the law of dower.[1]

Dower as against the holder of a mortgage in which the widow has not joined, where there are successive mortgages.

39. A right of dower in an equity of redemption existing in favor of the wife can not be affected by any subsequent mortgage executed by the husband alone, except in those States where he is permitted by law to divest her inchoate dower interest by his individual act.[2] In Titus *v.* Neilson,[3] the demandant had joined with her husband in the execution of a mortgage upon his lands. He afterwards executed a second mortgage in which she refused to join. Pending a bill for foreclosure by the first mortgagee, and after a decree for sale, but before the sale, the mortgagor died. His widow was endowed of the surplus proceeds remaining after the first mortgage was satisfied. So where a widow had released her right of dower in the second, only, of three mortgages, it was held that she was entitled to dower in the whole land as against the third mortgagee who had paid and

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[1] Smith *v.* Eustis, 7 Greenl. 41; Manning *v.* Laboree, 33 Maine, 343; Wilkins *v.* French, 20 Maine, 111; Young *v.* Tarbell, 37 Maine, 509, 515; Coles *v.* Coles, 15 John. 319; Coates *v.* Cheever, 1 Cow. 460, 478; Wheeler *v.* Morris, 2 Bosw. 524; Mathewson *v.* Smith, 1 Angell, (R. I.) 22, 27; Bullard *v.* Bowers, 10 N. H. 500; Rossiter *v.* Cossit, 15 N. H. 38; Carter *v.* Goodin, 8 Ohio State, 75; Hastings *v.* Stevens, 9 Foster, 564; Snow *v.* Stevens, 15 Mass. 278; Henry's case, 4 Cush. 257; Draper *v.* Baker, 12 Cush. 288; Whitehead *v.* Middleton, 2 How. Missis. 692; Moore *v.* Rollins, 45 Maine, 493, 495; 1 Washb. Real Prop. 182, § 16. The statutes before referred to (ch. 22, §§ 14–20) are to the same effect.

[2] Post, ch. 29.

[3] Titus *v.* Neilson, 5 John. Ch. 452. To the same effect, Hinchman *v.* Stiles, 1 Stockt. Ch. 361, 454.

discharged the first and second mortgages without the knowledge or consent of the husband.[1]

40. In Hinchman *v.* Stiles,[2] there were *three* mortgages, the first of which was made prior to the coverture, and was upon *one* of two tracts of land; the second during the coverture, but without the concurrence of the wife, was upon the other tract; and the third conjointly with her upon *both* tracts. After the death of the husband the third mortgagee filed his bill to redeem, making the widow, the holders of the first and second mortgages, and sundry judgment creditors of the deceased, parties defendant to the bill. The widow claimed dower as against the mortgage second in priority, which was not signed by her, and also as against the judgment creditors whose liens were subsequent to all the mortgages. The court, while recognizing the right of the demandant to be endowed of the equity of redemption, were somewhat at a loss to determine exactly how the conflicting claims of all parties should be adjusted. "The difficulty in this case," they said, "is here. The bill is filed by the third mortgagee. It is the intervening mortgage—the second mortgage —that was not executed by the widow. The widow, by her answer, insists that the first and third mortgages are first to be paid, and that after her costs are paid out of the surplus, the second mortgagee must take two-thirds of the residue, and the one-third must be invested for her benefit. And so her counsel contended on the argument. But on what principle can the second mortgage be postponed to the third? It does not lose its priority of payment from the mere fact that the wife did not sign it. The husband had the right to mortgage his interest in the land without his wife's consent, and a third mortgagee can derive no superiority over that interest to the second mortgagee, because he has procured a lien upon the further rights of the wife. The amount due on the first mortgage, together with that mortgagee's costs, must be first paid out of the proceeds of the lot which the mortgage covers. If there is more than sufficient for that purpose, the residue, or so much thereof as is necessary, must be appropriated to pay, first, the third mortgagee's costs, and then his mortgage. If the proceeds of the sale of the one lot pay off the first and third mortgages, there is no difficulty. Out

[1] Wedge *v.* Moore, 6 Cush. 8; ante, § 13. See, also, Walker *v.* Griswold, 6 Pick. 416; Reed *v.* Morrison, 12 Serg. & R. 18, 21.

[2] Hinchman *v.* Stiles, 1 Stockt. Ch. 361, 454.

of the proceeds of the other lot, the widow's costs of this suit must first be paid, and one-third of the residue must be invested so that she may receive the interest during her life. The balance goes to pay the second mortgage, and if not sufficient for the purpose, the mortgagee, at the death of the widow, will be entitled to the principal invested for the widow's benefit, or so much of it as will be required to satisfy his claim. But suppose the third mortgage is not paid by the proceeds of the sale of the first lot, how then are the rights between the second mortgagee and the widow to be settled, consistent with the rights of the third mortgagee? The second mortgagee says: 'I am willing the widow's costs should be paid out of the fund. I will take two-thirds of the surplus, and the other third must be invested for the widow's benefit during her life.' But to this the third mortgagee objects. His mortgage covers all the widow's interest in the fund, and her costs can not be paid out of the fund, nor can an investment of any part of it be made for her benefit until the third mortgage is discharged. Nor can the third mortgagee claim any of the fund until the prior incumbrance (the second mortgage) is discharged. There is no question in litigation between the second and third mortgagees. They make no point in the case. The mortgages must be paid according to their priority. Should there be a surplus after paying all the mortgages, the widow, perhaps, may claim something more than the one-third of the surplus. She may be entitled to her costs, and to have the amount of her interest in the fund which went to pay the second mortgage, first deducted, and also to have the one-third of the balance. But I have not well considered this point. When the property comes to be sold it may be unnecessary to do so. Let a master state the accounts, and let there be a decree for sale, directing the lot embraced in the first mortgage to be first sold, and out of the proceeds let the first mortgagee's costs and the amount due him be paid; and the residue, if any, be appropriated, first, to pay the third mortgagee's costs, and then the amount due on his mortgage. Let the proceeds of the sale of the other lot be brought into court, subject to further directions."[1]

41. Afterwards a sale was made and the money brought into court. By the chancellor: "The lot embraced in the first and third mortgages brought sufficient to pay off those incumbrances, leaving a surplus of five hundred and fifteen dollars and seventy-four cents.

[1] Hinchman v. Stiles, 1 Stockt. Ch. 361, per Williamson, Chancellor.

The second mortgage did not embrace this lot, and of course that mortgagee can have no claim upon this surplus. The question as to its disposition is between the widow of the mortgagor and the judgment creditors. This surplus represents the value of the equity of redemption. When this case was before the court at the last term, it was decided that the widow was entitled to her dower in the equity of redemption, and that the court would protect her interest. It is now insisted that the widow is entitled to the whole of the five hundred and fifteen dollars and seventy-four cents. This can not be so. She is entitled to nothing more than her dower in the equity of redemption. The sum represents that equity of redemption. She is entitled to the interest on one-third of it, and no more. Suppose the sheriff had sold two-thirds of the lot, and paid off the incumbrance; it is very clear that the widow would not have been entitled to the whole of the remaining one-third of the land as her dower. She would have been entitled to her dower, that is, her thirds, in the land that remained unsold." A decree was entered in conformity to this opinion. Dower was also allowed the widow in the proceeds of the tract covered by the second mortgage.[1]

When a mortgage will be treated as satisfied in favor of the widow of a mortgagor.

42. Payment of the mortgage debt by the husband, or what is tantamount thereto, by some one acting in his behalf, will, of course, satisfy the mortgage, and let his widow in to her dower.[2] We have seen that where a vendee of the husband, by his contract of purchase, is bound to apply the purchase money, or so much of it as may be necessary, to the extinguishment of an outstanding mortgage, a payment made in pursuance of such understanding is regarded as proceeding from the husband, and as a satisfaction of the mortgage in favor of his widow.[3] So where the equity of redemption of a mortgagor was sold on execution, but before any entry was made under the purchase, the mortgage money was paid by a third person who had formerly been a tenant under the mortgagor,

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[1] Hinchman *v.* Stiles, 1 Stockt. Ch. 454.

[2] See Brown *v.* Lapham, 3 Cush. 551, cited ante, § 17.

[3] Bolton *v.* Ballard, 13 Mass. 227; Carter *v.* Goodin, 3 Ohio State, 75; ante, §§ 11, 12.

and the mortgage was thereupon released to the latter, it was held that his widow was reinstated to her dower in the entire premises.[1]

43. Payment by the administrator of the husband will be attended with the same result. This has been several times decided in Massachusetts.[2] In Jennison *v.* Hapgood, a testator had devised certain real estate, on which a mortgage incumbrance existed, to his son. The son died, leaving a widow. The executor sold the equity of redemption and purchased it himself, and redeemed the mortgage, paying one-half of it with assets in his hands as directed by the will, and the other half with his own money. The widow and heirs of the son elected to affirm the sale; and it was held that the widow was entitled, on account of her dower, to the interest during her life on one-third of the sum for which the equity of redemption was sold, and on one-third of the amount paid out of the testator's estate towards extinguishing the mortgage.

44. In Rossiter *v.* Cossit,[3] the administrator of an insolvent estate redeemed, from assets in his hands, a mortgage upon a certain part of the real estate of the deceased in which his widow was dowable only of the equity of redemption, and afterwards sold the unincumbered estate, subject to her dower. It was held that she was relieved from the obligation to make contribution. But the administrator, in his account, notwithstanding he had acted in good faith, was allowed only so much of the payment made in redeeming the mortgage, as remained after deducting the amount to which the interest of those concerned in the estate had been prejudiced by the redemption. So where an administrator sold at auction an estate which was at the time mortgaged, and conveyed it with a covenant of warranty against all claims by, from, or under the estate, or himself, "but against no other persons;" and afterwards paid the amount due to the mortgagee, who executed a receipt upon the mortgage for the full amount due upon it, "in full discharge thereof," it was decided that the payment operated as a discharge of the mortgage and let the widow in to her dower.[4] A similar decision was made in

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[1] Barker *v.* Parker, 17 Mass. 564. See, also, Eaton *v.* Simonds, 14 Pick. 98, cited ante, § 14; and Wedge *v.* Moore, 6 Cush. 8, cited ante, § 13.

[2] Hildreth *v.* Jones, 13 Mass. 525; Snow *v.* Stevens, 15 Mass. 278, 280; Jennison *v.* Hapgood, 14 Pick. 345. See, also, Scott *v.* Hancock, 13 Mass. 162; Gibson *v.* Crehore, 3 Pick. 475, 481.

[3] Rossiter *v.* Cossit, 15 N. H. 38.

[4] 4 Hastings *v.* Stevens, 9 Foster, 564. See, also, Young *v.* Tarbell, 37 Maine, 509; Bullard *v.* Bowers, 10 N. H. 500, 502.

Rhode Island in the case of Mathewson *v.* Smith.[1] The mortgage debt was paid by the administrator of the mortgagor from the assets of the estate. The widow was endowed of the full one-third part of the premises, notwithstanding the personal estate was insufficient to pay all the debts.

45. In Walker *v.* Griswold[2] a grantee of land, upon receiving his deed, mortgaged it to the grantor to secure a portion of the purchase money. Afterwards he mortgaged it to a third person, his wife joining, and paid off the first mortgage. Upon his death it was held that his widow had a right of dower in the land, subject, however, to the second mortgage.

46. In Lanfair *v.* Lanfair,[3] land was conveyed by Leonard Lanfair to Samuel Lanfair, and at the same time an indenture was executed by the parties wherein Samuel demised and granted the premises to Leonard for life, for the purpose of securing to him a maintenance, in accordance with the object of the principal conveyance. The indenture was held to be a *mortgage*, and not a reconveyance of the freehold, and the widow of Samuel was allowed dower in the premises after the decease of Leonard, as against a person claiming under the former.

47. The holder, by assignment, of notes and a mortgage valid against the wife, surrendered them to the mortgagor, and took new notes and a new mortgage to himself, the wife not joining. It was held that she was dowable as of an unincumbered estate.[4] In this case, however, the first mortgage had never been recorded, and the court said its redelivery to the mortgagor under these circumstances rendered it inoperative as against the second mortgage, the latter having been duly recorded.

In Gage *v.* Ward,[5] the facts were as follows: Osgood conveyed to Ward, and Ward gave back a mortgage to secure the purchase money. Afterwards Osgood became indebted to Gage in a sum less than the amount secured by his mortgage. An arrangement was entered into by which Gage surrendered to Osgood the note of the

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[1] Mathewson *v.* Smith, 1 Angell, 22; accord. Campbell *v.* Murphy, 2 Jones' N. C. Eq. 357.

[2] Walker *v.* Griswold, 6 Pick. 416.

[3] Lanfair *v.* Lanfair, 18 Pick. 299. Had the indenture been treated as a reconveyance of an estate for life, then, as Samuel would have had but a vested remainder, and as his death took place in the lifetime of Leonard, his widow would not be dowable. Vide ch. 15.

[4] Hobbs *v.* Harvey, 16 Maine, (4 Shepley,) 80.

[5] Gage *v.* Ward, 25 Maine, 101.

latter; Ward paid to Osgood in money the difference between the amount of the note thus given up and the consideration money secured by the mortgage, and Osgood discharged the mortgage. At the same time Ward executed to Gage a new note and mortgage for the amount of the note surrendered to Osgood, but in this mortgage Mrs. Ward did not join.' It was held that she was entitled to dower in the entire estate.

48. Smith *v.* Stanley[1] was a similar case. A mortgagee released to a third person his mortgage lien on one-half the land, and received new notes for the amount due him, and a new mortgage of the land executed by the original mortgagor in conjunction with such third person. It was held that the widow of the original mortgagor was dowable of the moiety of the land which had thus been released.

49. A. and his wife mortgaged lands to B. the vendor, to secure the purchase money. During the coverture A. conveyed to C. subject to the mortgage, having paid a part of the debt. C. subsequently paid the balance, and the mortgage was satisfied of record. The defendant purchased from a person deriving title from C. It was held that as the mortgage had been fully satisfied, and no assignment taken, the widow of A. was entitled to dower, and could recover it at law.[2]

50. It is also held that a sale of the mortgaged premises under a judgment taken at *law* on the mortgage debt, will operate as a satisfaction of the debt and a discharge of the mortgage, in favor of the claim of the dowress. In order to bar the dower interest of the wife, the proceeding in which the sale is made must be founded directly on the mortgage. Thus, where the wife united with her husband in a mortgage to secure the payment of certain bonds of the husband, and the obligees recovered judgments at law on the bonds and levied upon and sold the mortgaged premises, it was adjudged that the wife was entitled to dower as against the purchaser from the sheriff.[3] This doctrine was carried still further in a case determined in Ohio. There the wife joined with her husband in a mortgage to secure his debt. The mortgaged premises were subsequently sold under a judgment at the suit of a stranger, and the court ordered the purchase money, in part, to be applied on the

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[1] Smith *v.* Stanley, 37 Maine, 11.

[2] Runyan *v.* Stewart, 12 Barb. 537, Johnson, J., dissenting.

[3] Harrison *v.* Eldridge, 2 Halst. 392.

mortgage debt. It was nevertheless held that the widow's claim of dower was paramount to the title of the purchaser.[1] The same principle was applied in a case where a vendor obtained a judgment at law for the unpaid purchase money of lands, instead of proceeding in equity for the enforcement of his lien, and levied upon and sold the lands under the judgment. The widow of the vendee was allowed dower as against the purchaser at such sale.[2]

51. Upon the same principle, where lands were devised charged with the payment of a legacy, and the legatees, instead of proceeding in equity for an enforcement of their lien upon the lands, elected to proceed by ordinary judgment and execution against the devisee, and levied upon and sold the lands devised, in satisfaction of the judgment, it was held that the sheriff's deed conveyed only the title existing in the devisee at the date of the judgment, and consequently that his widow was entitled to dower.[3]

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[1] Taylor *v.* Fowler, 18 Ohio, 567, Avery, J., dissenting.
[2] McArthur *v.* Porter, 1 Ohio, 99.
[3] Lloyd *v.* Conover, 1 Dutch. 47.

CHAPTER XXV.

DOWER AS AGAINST THE VENDOR'S LIEN FOR UNPAID PURCHASE MONEY.

1. We have seen that where a vendor of lands retains the title as a security for the unpaid purchase money, the superiority of his lien over the right of dower of the wife of the vendee is clear and wel established.[1] And in those States where the doctrine of the English courts of chancery recognizing an equitable lien as existing in behalf of the vendor, notwithstanding a conveyance by him of the legal title, is adopted,[2] the same principle prevails, and whenever the lien attaches, and, so long as it is preserved, it is paramount to the dower of the wife of the vendee.[3]

2. But where the purchaser of land gives to the vendor bond and security for the purchase money, no lien is retained, and the widow of the purchaser is entitled to dower.[4] So where it is agreed that the purchaser shall pay for the land by satisfying the demands of certain creditors of the vendor, and upon receiving a deed he executes to them his notes and a mortgage, his wife not joining therein, the rule is the same, and the wife is dowable of the land.[5] In the case

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[1] Chap. 20, § 44.

[2] It is adopted in New York, Maryland, Virginia, Tennessee, Mississippi, Georgia, Alabama, Missouri, Arkansas, California, Florida, Iowa, Michigan, Illinois, Indiana, Ohio, Kentucky, and Texas. It is rejected in Pennsylvania, North Carolina, and Maine, and is abolished by statute in Vermont. In Connecticut, Delaware, and Massachusetts, its existence remains undecided and in doubt. Hare & Wal. notes, 1 Lead. Cas. in Eq. 270, 271; 1 Washb. Real Prop. 508, note.

[3] Warner *v.* Van Alstyne, 3 Paige, 513; Ellicott *v.* Welch, 2 Bland, 242; McArthur *v.* Porter, 1 Ohio, 99; Fisher *v.* Johnson, 5 Ind. 492; Talbott *v.* Armstrong, 14 Ind. 254; Nax. Lit. Inst. *v.* Lowe, 1 B. Mon. 257; Willett *v.* Beatty, 12 B. Mon. 172; McClure *v.* Harris, 12 B. Mon. 261; Williams *v.* Woods, 1 Humph. 408; Bisland *v.* Hewett, 11 Smedes & Marsh. 164; Blair *v.* Thompson, 11 Gratt. 441; Wilson *v.* Davisson, 2 Rob. Va. 384. See, also, Meigs *v.* Dimock, 6 Conn. 458; Thompson *v.* Cochran, 7 Humph. 72.

[4] Blair *v.* Thompson, 11 Gratt. 441.

[5] McClure *v.* Harris, 12 B. Mon. 261.

last cited the court gave the following reasons for their judgment: "The purchaser paid the purchase money so far as the vendor was concerned, by the execution of his notes for the amount, to the vendor's creditors. No responsibility for the amount rested upon the vendor. His debts were paid, and so far as he was interested in the transaction, the effect was the same that it would have been had the purchaser, instead of executing his notes to the creditors, paid them the amount in money. The vendor's lien, therefore, was extinguished, and was not transferred by operation of law to his creditors, nor was there any contract between the parties that the creditors should have the benefit of the lien to secure the payment of their debts. Indeed, it is apparent that they did not rely upon it, as they procured the vendee to execute a mortgage for that purpose upon that, and also upon another tract of land, which would have amounted to a waiver of the lien, if the debt had still been due to, and the arrangements made with the vendor. The acceptance of other or additional security by a vendor, amounts to a waiver of his equitable lien."

3. In Meigs *v.* Dimock,[1] a father conveyed certain land to his son, in consideration of an undertaking on the part of the latter that he would support both his parents during their lives. The son gave bond for the maintenance as stipulated, and also executed to the father and mother a lease of one undivided moiety of about half an acre of the land, with a dwelling-house thereon, and of a like moiety of about seven acres, part of the premises conveyed to him, the lease to continue during their lives. About three years afterwards the son died insolvent, without having done anything in compliance with his contract or made any provision for the future support of his parents. Upon proceedings for dower by his widow, instituted after the death of the father and mother, against parties deriving title through the father after the death of the son, it was held that no vendor's lien existed in the case. "None of the cases," the court observed, "where a vendor has been decreed to have a lien on the land sold, for the payment of the purchase money, are like this. In all those cases, the vendor's object is money. He relies on his lien on the land, there being no other security, and the court of equity says he shall not be defeated. But what was the real nature of this transaction? Daniel Dimock, Sr., intends his son shall have all this

[1] Meigs *v.* Dimock, 6 Conn. 458.

estate. He takes a bond for the support of himself and wife during life, and a lease of the buildings and half an acre, and of seven acres of land during the same period. Not a cent of money was intended to be paid. He conveyed by deed. Why not take back a mortgage? Why not take a note or bond for the purchase money? The nature of the transaction did not require it."[1] The demandant was accordingly endowed of the lands.

4. Upon a sale of the land by an enforcement of the vendor's equitable lien, the purchaser takes it discharged of all claim of dower on the part of the wife of the vendee, and the rule is the same whether the sale be made in the husband's lifetime or after his death.[2] But if the sale be made after his death, she may claim dower of the surplus, if any, remaining after discharging the lien;[3] and it was held by the chancellor in Warner *v.* Van Alstyne, that she has an equitable right to have the estate of her husband in the hands of his personal representatives, as well as that which descends to his heirs, first exhausted in due course of administration, or upon the equitable principles of marshaling assets, for the payment of the vendor's claim, before resort is had to her dower right in the land for the recovery of the unpaid purchase money.[4] It is obvious, therefore, that where the vendor defers his proceedings until after the death of the husband, he must make the widow a party, otherwise she will not be concluded, and may look to the land for her dower, in proportion to the interest which her husband had therein.[5] This principle is stated in emphatic terms in McArthur *v.* Porter. "Had the estate of Porter, which was assets in the hands of his administrator,

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[1] For the circumstances under which a vendor's lien will be held to attach, and what will be deemed a waiver or extinguishment of the lien, see 1 Lead. Cas. in Equity, 262–281, and 1 Washb. on Real Prop. 504–509, where the cases upon this subject are collected and considered.

[2] Bisland *v.* Hewett, 11 S. & M. 164; Williams *v.* Woods, 1 Humph. 408; Naz. Lit. Inst. *v.* Lowe, 1 B. Mon. 257; Wilson *v.* Davisson, 2 Rob. Va. 384; Barnes *v.* Gay, 7 Clarke, (Iowa,) 26.

[3] Thompson *v.* Thompson, 1 Jones' (N. C.) Law, 430; Klutts *v.* Klutts, 5 Jones' (N. C.) Eq. 80; Williams *v.* Woods, 1 Humph. 408; Thompson *v.* Cochran, 7 Humph. 72; Warner *v.* Van Alstyne, 3 Paige, 513; Willett *v.* Beatty, 12 B. Mon. 172. See ch. 20, § 44.

[4] Warner *v.* Van Alstyne, 3 Paige, 513; accord. Thompson *v.* Thompson, 1 Jones' (N. C.) Law, 430; Klutts *v.* Klutts, 5 Jones' (N. C.) Eq. 80; contra, Lewis *v.* Moorman, 7 Port. (Ala.) 522. In Crabb *v.* Pratt, 15 Ala. 843, the court were in doubt upon this point. And see ch. 23, §§ 31–34.

[5] Willett *v.* Beatty, 12 B. Mon. 172; McArthur *v.* Porter, 1 Ohio, 99.

proved insufficient to pay the debt, it would then have been necessary for Talliaferro to have enforced his lien against the widow's dower estate. This could only be done by making the widow a party. Could she have been legally divested of the freehold vested in her by the death of her husband, upon the mere suggestion of an equitable lien of which she might be totally ignorant, without giving her a day in court to defend her right or redeem her land? Such a principle would be most arbitrary and unjust."[1] In Willett *v.* Beatty, lands were sold to satisfy a decree rendered after the husband's death, upon a vendor's lien, but the widow was not made a party, and the court gave her dower by taking the fair value of the lands at the time of the sale, excluding from the estimate improvements afterwards made, and deducting therefrom the purchase money due at that date. One-third of the excess was set apart to the widow for the term of her life, she to receive the interest on that sum, or enjoy a proportion of the property equivalent in value thereto. The court also gave her a proportionate share of the rents and profits from the time she had been ejected from the premises under the sale.[2]

5. It is necessary, also, in order to divest dower, that the proceedings of the vendor be expressly founded on his equitable lien, and for the enforcement thereof. If he proceed at law, and recover judgment against the purchaser or his personal representatives, and then levy upon and sell the lands in satisfaction of his judgment, the widow may claim dower in the lands as of an unincumbered estate. This point was determined in McArthur *v.* Porter, already referred to. "The defendant, Sarah," the court said in that case, "by her marriage with George Porter, acquired the right of being endowed in these lands if she survived her husband. Upon his death this right invested her with a complete, perfect, legal estate. If an equitable lien existed upon the lands for purchase money, it belonged to Talliaferro, and to no one else. As to all the world beside, her right was clear and unquestionable at law. At the sheriff's sale the complainant did not purchase any right or interest that belonged to Talliaferro. He purchased the estate of which George Porter died seized, and nothing more. George Porter held this estate subject to his wife's claim of dower. In his lifetime he could not, by any act of his own, discharge the estate of this claim. The sheriff

[1] McArthur *v.* Porter, 1 Ohio, 99, 101.
[2] Willett *v.* Beatty, 12 B. Mon. 172.

could sell nothing more than what George Porter himself could have sold. The land, therefore, was sold by the sheriff and purchased by the complainant subject to this charge of dower. . . . The land was sold as assets in the hands of the administrator for the payment of the debt due of the purchase money. It sold for a sum sufficient, and the proceeds were applied in discharge of that debt. By this payment, the lien for purchase money, whatever its character or effect might be, became extinct. It never passed from Talliaferro, but perished in his hands."[1]

6. And in North Carolina it is held that so long as the vendor does not assert his lien, the widow of the vendee may claim dower in the entire estate. Thus, in Thompson *v.* Thompson,[2] the husband purchased land, took a bond for the title upon making payment of the purchase money, paid a portion of the consideration, and died. Dower was assigned to the widow in the same manner as if full payment had been made. "It was insisted," the court observed, "that if the widow be endowed of one-third of the land, although it is subject to the rights of the vendor, still his security will be impaired, for it will be subdivided and split up into several parts. This does not follow. As long as the vendor is content with his security, and permits the widow to continue in possession of the one-third allotted to her, she can only be required to keep down the interest upon one-third of such part of the purchase money as remains unpaid. When the vendor desires to have his money, if it can not be made out of the personal estate of the vendee, (which is the fund primarily liable,) he can file a bill for the specific performance of the contract, and the money must then be paid, or raised by a sale of the land. Whether the other two-thirds of the land, and the reversion of the third covered by the dower will not be bound to exonerate the widow, by being applied to the discharge of the debt of her husband, is a question that we will not now decide, as it has not been discussed before us." But the widow of a vendee can not sustain a claim for dower against a vendor, nor those succeeding to his rights, where the husband never had the legal title, and the purchase money has not been paid.[3]

7. Where the vendor's lien is enforced in the lifetime of the husband, and a sale of the land produces more money than is required

[1] McArthur *v.* Porter, 1 Ohio, 99.

[2] Thompson *v.* Thompson, 1 Jones' (N. C.) Law, 480.

[3] Barnes *v.* Gay, 7 Clarke, (Iowa,) 26.

to satisfy the claim of the vendor, it is an unsettled question whether the wife of the vendee may not insist that a proper proportion of the surplus fund shall be invested or secured for her benefit, in the event that she survives her husband.[1] In a case where the vendor of land conveyed the same to the vendee in fee simple, and received part of the purchase money, but no security for the residue, on a bill in equity to enforce the equitable lien of the vendor, a sale was decreed, and produced more than sufficient to satisfy what remained due to the vendor. The surplus was claimed by judgment creditors of the vendee, and with the assent of the latter a decree was entered directing it to be applied on their judgments. After the death of the vendee his widow filed a bill against the parties in possession under the sale, claiming dower in the land. It was held by two of the judges that the land in the hands of the purchasers was discharged from her dower. The third judge dissented, holding that the widow was entitled to dower in the surplus which remained after satisfying the vendor's lien, and that the amount to which she was entitled constituted a charge upon the land in the hands of the purchasers.[2] Since this decision, a statute has been adopted in Virginia, providing, in cases of this kind, for the protection of the inchoate dower interest of the wife, by directing that a portion of the surplus fund arising from the sale shall be invested in such manner as to secure her right.[3]

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[1] See ch. 16, §§ 18–33; ch. 23, §§ 26–30.

[2] Wilson *v.* Davisson, 2 Rob. Va. 384.

[3] Code Va. (1849,) p. 474, § 3. This statute is set out, ante, ch. 23, § 30.

CHAPTER XXVI.

DOWER IN LANDS ACQUIRED FOR PARTNERSHIP USES.

1. WHEN, and under what circumstances, lands acquired for partnership uses, are to be regarded in equity as realty, and when as personalty, is a vexed question in the law. Upon this subject much diversity of sentiment has existed, and many conflicting decisions have been made. It does not fall within the scope of this work, however, to attempt an analysis of the authorities relating to this general question. Its discussion properly belongs to the department embracing the Law of Partnership, and it has already been fully treated by careful and competent hands.[1] A statement of the general doctrine appearing to result from the weight of authority, and a reference to the decided cases in which that doctrine has been applied to the right of dower, is all that will be attempted here.

2. The following propositions seem to be established by the American decisions: *First.* That real estate purchased with partnership funds, or for the use of the firm, is, in equity, chargeable with the debts of the copartnership, and with any balance that may be due from one copartner to another upon the winding up of the affairs of the firm. *Second.* That as between the personal representatives and the heirs at law of the deceased partner, his share of the surplus of the real estate of the copartnership, which remains after paying the debts of the copartnership, and adjusting all the equitable claims of the different members of the firm as between themselves, is to be considered and treated as real estate.[2] Of his share of the surplus thus treated and considered as real estate, the widow of the deceased partner may claim dower.

3. In equity the right of the partners to have the real estate of the partnership treated as a fund properly applicable to the payment

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[1] Coll. Partn. 4th Amer. ed. § 133 *et seq.*, and note; § 156, and note; Story, Partn. § 93; Gow, Partn. ch. 5, § 3; 3 Kent, 37–89, and notes; 1 Story's Eq. § 674.

[2] Per Walworth, Chancellor, in Buchan *v.* Sumner, 2 Barb. Ch. R. 165.

of the partnership debts, and to the satisfaction of any balances growing out of the partnership transactions that may be due among themselves, is regarded as attaching upon the instant of the acquisition of the estate, and therefore as paramount to the claim of dower. The principle is that the widow can have dower of no greater nor better estate than existed in the husband at some period during the coverture. Her right attaches subject to all incumbrances or equities existing at the time of the marriage, or attaching with the purchase by the husband, and is liable to be defeated by every subsisting claim which might have defeated the husband at the period of his best estate.

4. All the cases agree that where the articles of copartnership contain an express stipulation that upon the dissolution of the partnership the property of the firm, whether real or personal, shall be first applied to the payment of the debts of the concern, the right of the several partners to insist upon such application, to the exclusion of dower of the widow of any one of their number, is clear and incontestable. Lord Thurlow, in the early case of Thornton *v.* Dixon,[1] expressed an opinion to this effect, and later decisions have thoroughly established this point as settled law.

5. Greene *v.* Greene[2] appears to be the first American case, in which the question was directly presented and decided. Richardson *v.* Wyatt[3] was determined several years earlier, and it was there held that the widow of a deceased partner is not entitled to dower in lands purchased with the partnership funds and held in the names of the copartners, or for their use; but the case is very imperfectly reported, and the grounds of the decision are not stated. It does not appear whether the articles of copartnership contained any provision respecting the ultimate disposition of the partnership effects, or if any, what that provision was. But in Greene *v.* Greene, it is shown that by the articles of copartnership it was stipulated that, on the dissolution of the partnership, the property of the concern should all be sold, and the proceeds applied first to the satisfaction of the partnership debts. The real estate of which dower was demanded was purchased as a site for a manufacturing establishment. Buildings necessary for carrying on the business of the firm were erected

[1] Thornton *v.* Dixon, 3 Bro. C. C. 199; Park, Dow. 107.

[2] Greene *v.* Greene, 1 Hammond, 535.

[3] Richardson *v.* Wyatt, 2 Desauss. 471. See, also, Winslow *v.* Chiffelle, 1 Harper's Eq. 25.

thereon, and were occupied and used exclusively for that purpose. The title was taken in the joint names of all the partners. The partnership was insolvent. Upon the decease of one of the partners, who was largely indebted to the firm, his widow made claim for dower, but it was held that the equity of the surviving partners to have the lands appropriated to the discharge of the indebtedness of the firm, was superior to her claim. "The widow, by our statute," the court said, "is entitled to dower of all lands of which the husband was seized, as an estate of inheritance, at any time during the coverture. Her estate is but a part of his, is derived from him, and must be subject to all incumbrances existing against it at the time of the marriage, or the acquisition by the husband. The husband can, by no act of his, destroy or affect her right of dower where it has once attached, but it only attaches where he has a real beneficial interest in the lands of which dower is claimed. . . . . In this case the property was purchased, and the deed taken in the names of the partners, but it was bought with partnership funds, and for partnership uses, and was, therefore, subject to the condition expressed in the articles of partnership, that at its termination, all the property should be sold for the payment of the debts. The interest which each partner had in the property so purchased, was, at the moment of the acquisition, subject to this condition of the agreement. This agreement, in equity, converts the land into personal property, as between the partners and their creditors, and subjects it to all the liabilities of their joint stock in trade. It shows the original understanding of the parties, that it is to be treated as partnership effects, and not as an estate in lands held in common. . . . . The principle has often been recognized that lands bought with partnership funds, and applied to partnership uses, are, when there is an agreement that they shall be sold for the payment of debts, or other purposes connected with the trade, considered in equity as personal property so far as necessary for any of the purposes of the partnership. It is considered as a trust attaching to the estate at the time of its acquisition, and which a court of equity is bound to execute as against the partners, or those claiming under them with notice. . . . . At the moment of the acquisition of this estate, each partner acquired, as against the others, an equitable right to have this trust specifically executed according to the terms of their agreement, and each was under a corresponding obligation to the others to dispose of the land, and appropriate the proceeds as originally agreed

upon. It was an equitable lien which attached to the estate at the moment of its acquisition, and each partner, and all claiming their estate, as the heir, or widow, must take, subject thereto, and can have only the interest that the deceased partner had. It has been too repeatedly determined to be now questioned, that the separate estate of a partner consists of that part of the partnership effects which shall remain after the debts of the partnership and the demands of the partner *qua* partner are satisfied. . . . . The interest which William Greene, the husband of the complainant, had at the moment of his death, in the partnership effects, was the surplus after payment of the partnership debts, and the balance due his partners. The case shows that he had never advanced anything; the whole funds, both for the purchase of the lot of which dower is claimed, and for carrying on the business, were advanced by his partners, and at the time of his decease the partnership was insolvent. If this estate is to be considered in equity as personal property, and the court have no hesitation in saying that it must be so considered as between the partners and their creditors, he had no substantial interest at the time of his death which would go to his representatives, or could be taken by his separate creditors. If it be considered as real estate, it was acquired subject to a condition or agreement that qualified the estate of the husband; and the wife, when there is an agreement, unless it were executed after her right attached, would be bound thereby, so as to exclude her right to dower."[1]

6. And although the decisions upon the point are, to some extent, conflicting, the better opinion appears to be, that even in the absence of an express agreement, where lands are purchased with partnership assets for partnership uses, the law will imply an undertaking, as among the partners, that they shall be subject to the payment of the partnership debts; and consequently, as respects dower, that the same rule applies as where an express agreement to that effect is made.

7. This was decided, after elaborate argument, in Sumner *v.* Hampson.[2] In that case certain persons had formed a partnership as "builders, master carpenters and general speculators," which was continued until the death of one of the partners. There were no written articles of copartnership. In the course of the business of

[1] Greene *v.* Greene, 1 Hammond's (Ohio) R. 535, 542.
[2] Sumner *v.* Hampson, 8 Ohio, 328, 364.

the firm they acquired certain parcels of real estate with the partnership funds. This real estate was required for the payment of their outstanding debts. It was held that the widow of the deceased partner was not entitled to dower. "Wherever a proper partnership subsists," the court said, "the partnership debts impose a lien upon the partnership property, both as between the partners themselves, and the creditors and the partners, or their representatives. This lien arises at the acquisition of the property, from the relation itself of partners, and is liable to be defeated by a *bona fide* sale, only. If lands can be holden in partnership after the same rules as personalty, the right of the dowress must be subordinate to this lien. For her estate is derived from her husband, and is subject to all incumbrances existing against it at the acquisition of his title. In the earlier stages of the common law, no proper partnership in lands could subsist; but as social arrangements became more complex, land was necessarily used in partnership purposes, firstly as auxiliary to the general objects of the association, or received for debts, and more lately as direct capital stock. Numerous cases upon this subject are cited in the argument. They show that the same rules which affect chattels, have gradually been extended to lands held for partnership purposes; that wherever partners manifest their intention to hold lands as partnership stock, either by express convention or by their course of dealing, it will be treated as such in all respects, in courts of equity. If such be the law in England, and in the elder States, its policy is more imperative here, where real estate is so much the subject of traffic."

8. In Dyer *v.* Clark,[1] the Supreme Court of Massachusetts, in a carefully considered opinion, came to the same conclusion. Shaw, C. J., said: "When, therefore, one of the partners dies, which is *de facto* a dissolution of the partnership, it seems to be the dictate of natural equity, that the separate creditors of the deceased partner, the widow, heirs, legatees, and all others, claiming a derivative title to the property of the deceased, and standing on his rights, should take exactly the same measure of justice as such partner himself would have taken, had the partnership been dissolved in his lifetime; and such interest would be the net balance of the account, as above stated. . . . . On the facts of the present case, we are of opinion that the real estate in question was a part of the capital

[1] Dyer *v.* Clark, 5 Met. 562.

stock, purchased out of the partnership funds, for the partnership use, and for the account of the firm. The partners entered into articles as distillers. The business required a large building and fixtures, which they purchased and paid for in part out of the joint funds, and gave notes in the partnership name for the remainder of the price, and the estate was regarded by them as partnership effects. The repairs and improvements were also charged to joint account. These are all decisive indications of joint property. The plaintiff has received a sum in rents and profits that have accrued since his partner's death. The defendant Clark, as administrator of Burleigh, the deceased partner, has sold an undivided half of the property as his, under a license, and with the assent of the plaintiff. The widow joined to release her dower, for a nominal sum. But we can not perceive that the right of the widow is distinguishable from that of the creditors and heirs of the deceased partner. As far as this estate was held in trust by her deceased husband, she was not entitled to dower. For all beyond that, she will be entitled, because he held it as legal estate, unless she is barred by her release; of which we give no opinion."

9. In Burnside *v.* Merrick,[1] a similar decision was made by the same court. The following is from the opinion delivered in that case: "We are then brought to the main question, which was discussed at the bar, namely, whether real estate, purchased by partners, for the partnership business, paid for out of their partnership funds, or received in satisfaction for partnership debts, under deeds in common form, conveying the estate to them by their several names, that is, by such a deed as, in case of other parties, would make them tenants in common, shall be considered as partnership stock, and if so, how and in what mode? Though there has been much diversity of judicial opinion upon the subject, we think the prevailing opinion now is that real estate, so acquired, is to be considered at law as the several property of the partners, as tenants in common; yet that it is so held, subject to a trust arising by implication of law, by which it is liable to be sold, and the proceeds brought into the partnership fund, as far as is necessary to pay the debts of the firm, and to pay any balance which may be due to the other partners, on a final settlement; and can not be held by the separate owner, except to the extent of his interest in such final

[1] Burnside *v.* Merrick, 4 Met. 537, 541.

balance. And it follows as a necessary consequence, that when the firm is insolvent, the whole of the property, so held, must be brought into the partnership fund, in order to satisfy the partnership creditors, as far as it will go for that purpose. And it follows as another necessary consequence, that neither the widow, nor heir at law, can claim any beneficial interest in such estate until the claims of creditors are first fully satisfied." The same doctrine was held in the case of Howard *v.* Priest.[1]

10. This principle has also been adopted in Indiana. In the case of Matlock *v.* Matlock,[2] where the question seems to have been first presented in that State, the court say: "The pleadings show that the lands in controversy were purchased with partnership funds, for the use of the firm, and that their sale is necessary to discharge the debts of the firm. Under these facts the widow is not entitled to dower until the partnership claims are satisfied. It has frequently been decided, that the widow is not entitled to dower as against the vendor, for the purchase money, and this whether the legal estate vests in the husband during his lifetime or not. On similar principles, courts of equity regard a partner's real interest in the firm to be his share of the surplus after the debts of the firm are paid and a final balance ascertained; and allow each partner a lien on the funds for his share of the surplus, as well as for his indemnity against the joint debts." The subsequent case of Hale *v.* Plummer[3] is in accordance with the principle here laid down.

11. So in Kentucky. In the recent case of Galbraith *v.* Gedge,[4] the court thus express their views upon this subject: "Whether real property, held by partners as partnership stock, is to be regarded as converted into personalty, is a question about which there has been a diversity of opinion. It would be unprofitable, and a waste of time, to attempt to collate and analyze all the conflicting authorities upon this subject. We are inclined to think that real property held in the joint names of the firm as partnership stock, should be regarded, at law, in the absence of any agreement or understanding to the contrary, as held and owned by them as tenants in common, subject to the ordinary incidents of tenancies in common. But that, in equity, it should be considered as held by them in trust as part-

[1] Howard *v.* Priest, 5 Met. 582.
[2] Matlock *v.* Matlock, 5 Ind. 403.
[3] Hale *v.* Plummer, 6 Ind. 121.
[4] Galbraith *v.* Gedge, 16 B. Mon. 631.

nership property, subject to the ordinary rules applicable to partnership personal property—as liable to the satisfaction of the claim of each partner upon the others, and as liable to the satisfaction of the debts of the partnership. After the satisfaction of the claims of the several partners, and of the debts of the concern, the residue of the real estate will be considered, where the partners have not impressed upon it the character of personalty, as belonging to the partners, both in equity and at law, as tenants in common; and it will be subject to division and several appropriation among them. The land in contest, according to the proof, was held 'as belonging to the firm, being purchased by the money of the firm,' but had not been impressed by them with the character of personalty, so far as the record shows. It was held, therefore, as partnership stock, subject, in equity, to the incidents which have been mentioned; but at law, subject to the rules applicable to a tenancy in common. If these views be correct, as we think they are, in accordance with the tenor of the authorities, it follows, that upon the death of F. G. Gedge, his interest in the land descended to his heirs at law, who became tenants in common with the surviving partners, and a right of dower therein, of the widow, attached to this interest; but the rights of the widow and heirs were subject, in equity, to be entirely defeated by the necessity of appropriating the land to the payment of debts. This necessity existed in this case, and the widow and heirs must surrender all claim to the land."[1]

12. In Florida, also, it has been held that the widow is not entitled to dower out of real estate purchased by her deceased husband and his partner, with the partnership funds, for partnership purposes, although it is conveyed to them in such manner as to make them tenants in common, until the implied trust to which such property is subject for the payment of the partnership debts has been satisfied.[2]

13. And it has been decided in Missouri, that where real estate is bought by a partnership as partnership property, and is afterwards conveyed in payment of a partnership debt, and the firm is insolvent, no right of dower attaches.[3]

14. In Maryland, the doctrine that the right of dower is subordinate to the equity of the partners to have the lands of the firm

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[1] See, also, Divine *v.* Mitchum, 4 B. Mon. 488.

[2] Loubat *v.* Nourse, 5 Florida, 350.

[3] Duhring *v.* Duhring, 20 Misso. 174.

applied in satisfaction of the partnership liabilities, was expressly recognized in the case of Goodburn *v.* Stevens.[1]

15. A case, however, has been determined in New York, in which it was held that, in the absence of any *express* agreement of the partners, stipulating that lands acquired by them shall be applied in discharge of the partnership debts, this equitable doctrine does not apply, and the lands of the firm are subject to dower. In that case real estate acquired by partners with their joint funds was afterwards mortgaged by them. Upon the death of one of the partners, his widow, who had joined in the mortgage, was endowed of his share of the equity of redemption. "Although the lands were partnership property," said the vice-chancellor, after reviewing the authorities, "and the transactions relative to their purchase were of a commercial nature, and the proceeds (under the circumstances) are liable to be applied to the satisfaction of the joint debts, yet in a strict sense they were real estate and subject to its incidents. The partners were respectively seized of a legal estate of inheritance in the lands as tenants in common, notwithstanding it was to be treated as partnership property; and the right of dower attached as an incident to the legal title and seizin. On this account it became necessary for Mrs. Jackson to unite with her husband in the mortgages. She had still a right of dower in the equity of redemption. This right was not entirely lost by the foreclosure and sale. It attached in equity to the surplus, after satisfaction of the mortgage debt. Instead of legal, it then became equitable dower; and which no act by the husband could impair without her concurrence. My conclusion on the last point," the vice-chancellor added, "may not seem to be reconcilable with the decision in the Ohio case of Greene *v.* Greene,[2] where the court proceeded mainly upon the effect of the special agreement in the articles of copartnership, and as to its being sufficient to prevent any right of dower from attaching upon the land. If that decision can be supported upon principle, I apprehend it can only be done through the particular circumstances of the case. It is sufficient to say the facts in the present case are different."[3]

16. The ruling in the foregoing case is supported, to some extent,

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[1] Goodburn *v.* Stevens, 1 Md. Ch. Decis. 420; S. C. 5 Gill, 1.

[2] Greene *v.* Greene, 1 Ham. 535; ante, § 5.

[3] Smith *v.* Jackson, 2 Edw. Ch. 28, 35.

by the decision of the master of the rolls, Sir William Grant, in Bell *v.* Phyn.[1] The real estate in question in the latter case was partnership property, bought with partnership funds, but there was no agreement that it should be applied in satisfaction of the firm debts. The lands were sold, and upon bill filed by a legatee praying an account of the personal estate, and claiming the testator's share of the partnership lands as passing under the will, it was held that the widow of the testator was entitled to dower. The master of the rolls said: "If this was partnership property, there was nothing done by the partners to alter the nature of it. This sum, therefore, for which the estate sold, must be considered of the nature of real estate, and there must be a reference to the master to settle the widow's dower." According to the editor of Collyer on Partnership, however, the report omits to state one important fact, namely, that the estate was conveyed to the partners, "to hold to them, their heirs, &c. *as tenants in common.*"[2] But Mr. Eden, in his note to Thornton *v.* Dixon,[3] intimates that the authority of the case is shaken, if not entirely overruled, by subsequent decisions.

17. The decision in Smith *v.* Jackson seems to be directly opposed to the current of modern authority, and has received the marked condemnation of Chancellor Kent. "The vice-chancellor in New York, in Smith *v.* Jackson, 2 Edwards' Rep. 28, reviews all the conflicting cases on this point; and he follows the Supreme Court of New York, and holds, that though real estate be purchased with joint funds for partnership purposes, there is no survivorship as to the real estate, and the share of a deceased partner, as a tenant in common, descends to his heirs, unless there be an *agreement* among the partners that the lands so purchased shall be considered as personal property; and that then, upon the foot of that agreement, and not without it, equity would apply the lands to pay partnership debts. Nay, he gives the wife her dower in the partnership share of the husband so descended. The decisions on this side of the question appear to me to be a sacrifice of a principle of policy, and above all, a principle of justice, to a technical rule of doubtful authority. There is no need of any other agreement than what the law will

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[1] Bell *v.* Phyn, 7 Vesey, Jr. 453. See, also, Park, Dow. 106.

[2] Collyer on Partner. 4th Amer. ed. § 133, note, where reference is made to the record.

[3] 3 Bro. C. C. 199. See, also, notes to Bell *v.* Phyn, 7 Vesey, Jr., Sumner's edition.

necessarily imply, from the fact of an investment of partnership funds, by the firm, in real estate, for partnership purposes."[1] Since the decision in Smith *v.* Jackson, the rule, in New York, appears to have been settled in accordance with the views here expressed.[2]

18. In a case decided in Mississippi the court seem to have adopted, to some extent, the doctrine of Smith *v.* Jackson. It was there held that if lands are purchased by partners under an agreement that they shall be sold for the benefit of the partnership; or if, without such agreement they are actually applied for the benefit of the concern, they are to be considered as partnership property, and not subject to dower. But that in the absence of such agreement or application, the rule is otherwise.[3] So where two persons formed a copartnership for the purpose of carrying on a mercantile business, and afterwards, by mutual consent, engaged also in the buying and selling of lands and town lots, conveying them, not in their partnership name, but in their individual names as tenants in common, it was held that the lands and lots so conveyed were subject to dower.[4]

19. It is held in Virginia that in order to exclude dower, the lands must be acquired strictly as partnership property, and be held exclusively for partnership uses. Thus, where A. and B. purchased a mill, and two hundred acres of land for the purpose of carrying on the milling business together, and took a conveyance in their joint names, and, to pay the purchase money, gave their individual bonds, it was adjudged that although such bonds were partly paid out of the copartnership funds, and the residue from money procured on the credit of the partnership, but afterwards repaid to the lender by B. alone, after the death of A., the real estate was not to be considered partnership property, but as land purchased by them individually, of which each was tenant in common with the other, of an undivided moiety, and that the widow of A. was entitled to dower in his moiety of the same.[5]

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[1] 3 Kent, 39, note.

[2] Buchan *v.* Sumner, 2 Barb. Ch. 165, 200, 201; Ibid. 336; Delmonico *v.* Guillaume, 2 Sandf. Ch. 366; Averill *v.* Loucks, 6 Barb. S. C. 19, and note, p. 28; Buckley *v.* Buckley, 11 Barb. S. C. 43.

[3] Wooldridge *v.* Wilkins, 3 How. Missis. 360.

[4] Markham *v.* Merrett, 7 How. Missis. 437.

[5] Wheatley *v.* Calhoun, 12 Leigh, 264. And see Galbraith *v.* Gedge, 16 B. Mon. 631, 636.

20. And where, by consent of the partners, lands purchased with partnership funds are conveyed directly to one of the partners, with an express agreement that he shall hold them in severalty in his own right, and be charged upon the partnership books with the amount paid therefor, it seems that his widow is entitled to dower. This point was determined by Lord Chancellor Loughborough, in Smith *v.* Smith.[1] In that case lands had been purchased and conveyed to one partner under an agreement of the character above stated. Some time afterwards a commission of bankruptcy issued against the firm jointly, and the lands were sold by the assignees, under the commission. At the time of the sale, an agreement was executed between the assignees and the wife of the partner to whom the lands had been conveyed, reciting that she claimed dower therein; that the purchasers under the commission required that she should release her dower and levy a fine; and that the assignees, as an inducement thereto, proposed, in lieu of dower, to allow her the sum of £330 in case it should be found she was dowable of the lands. The fine was accordingly levied. The case arose upon bill by the husband and wife, praying a specific performance of the agreement; against which it was insisted that the lands were purchased with partnership funds for the use of the partnership, and that therefore they were not subject to dower. The lord chancellor held that the wife was entitled to dower, but he placed his decision upon the ground, expressly, that by agreement of the partners, the husband was to become debtor to the firm for the amount of the partnership funds applied to the purchase of the property. "The distinction is, the agreement as to the purchase of these houses was specific. Upon that they never could be specifically divided, as if they were part of the partnership stock; but when they came to settle, the houses were Robert Smith's, and he was debtor for so much money. The whole turns upon that."[2]

21. It has before been stated that it is only to the extent that its appropriation is necessary to the payment of the partnership indebtedness, and to the equalization and adjustment of the accounts of the several partners as among themselves, that the real estate of the firm will be treated as personalty, even in a court of equity;[3] and

[1] Smith *v.* Smith, 5 Vesey, Jr. 189.

[2] See, also, Park, Dow. 107; 1 Greenl. Cruise, *168, § 16; 1 Washb. Real Prop. 158, § 12; Story on Partn. §§ 92, 93.

[3] Ante, §§ 2, 3.

this appears to be the doctrine of the authorities. The surplus, if any, will be considered in equity, as at law, real estate, and the widow of a deceased partner will be dowable of his proportion of such surplus.[1] But the right of the widow to be endowed in partnership lands is suspended until the purposes of the partnership are accomplished by paying all claims against it, and adjusting the accounts of the partners. For this reason, it is held that she can not claim rents and profits from the death of her husband, but only from the period when the affairs of the partnership are settled and closed.[2]

22. But contrary to the general tenor of the American authorities, it is held in Virginia, that the real estate of a partnership, where it is acquired with partnership funds, and is held strictly for partnership uses, is to be regarded in equity as personalty for *all* purposes, and that no right of dower attaches whether the firm be solvent or not. In Pierce *v.* Trigg,[3] Tucker, President of the Court of Appeals of that State, after reviewing several of the English cases, remarked: "It has been a vexed question in England, whether the interest of the deceased partner in the real estate belonging to the firm, and the proceeds of the sale of that interest, belong to the personal representative or to the heir. The better opinion gives the fund to the former, and with reason; since upon familiar principles, as the land was bought with the personalty, and was brought into the firm as stock, it ought, as between the executor and the heir, to replace the fund withdrawn from the personal estate. By placing it as stock in the partnership fund, the deceased evinced a design to treat it as personalty, and it ought to go accordingly. The representatives of the deceased can claim it only as stock, and as stock in trade it is *ex vi termini*, personal." In this connection the president referred to the subject of dower in lands so held by partners, and, noticing the case of Smith *v.* Smith,[4] said: "In that case, the conveyance was made to one of the partners, and the question was whether his wife had a right of dower. The court decided she had,

[1] Goodburn *v.* Stevens, 5 Gill, 1; S. C. 1 Md. Ch. Dec. 420; Hale *v.* Plummer, 6 Ind. 121; Matlock *v.* Matlock, 5 Ind. 403; Galbraith *v.* Gedge, 16 B. Mon. 631; Loubat *v.* Nourse, 5 Florida, 350; Dyer *v.* Clark, 5 Met. 562; Howard *v.* Priest, Ibid. 582; Burnside *v.* Merrick, 4 Met. 537; 1 Washb. Real Prop. pp. 158–160, § 12. See, also, Buchan *v.* Sumner, 2 Barb. Ch. 165.

[2] Goodburn *v.* Stevens, 1 Md. Ch. Decis. 420; S. C. 5 Gill, 1.

[3] Pierce *v.* Trigg, 10 Leigh, 405.

[4] See ante, § 20.

but upon the specific provisions of the deed, which proved that the purchase was made with the express agreement that her husband, to whom the deed was executed, should not hold for the firm, but in his own right, and be held debtor to the firm for the money advanced. The chancellor held, that but for this specific agreement, 'although the deed was taken to one of the partners, the estate would have been regarded as partnership property,' and so the wife would not have been entitled to dower. See, also, Sir S. Romilly's argument in Bell *v.* Phyn, 7 Ves. 456. A case has been mentioned by my brother Parker, of Taylor *v.* Thompson, not reported, in which this court allowed dower to the widow of a partner who had purchased property with the partnership funds. It was not bought for partnership purposes, nor so held, although it was paid for, I think, out of partnership funds. It resembles, therefore, the case of Smith *v.* Smith, 5 Ves. 189, and it is probable the court considered the defendant as having a mere equity to charge the estate, which could not prevail against the widow's legal right of dower. Be that as it may, the facts of that case are too obscurely recollected to enable me to follow it as a guide. Upon the whole, I am of opinion that the late English cases propound the true rule, and that real estate purchased with partnership funds, must be regarded as partnership stock, and treated as personalty." The firm was solvent, but the court, upon this reasoning, nevertheless held that the widow of one of the parties who had deceased free from all indebtedness to the surviving partners, was not entitled to dower. The members of the court, however, were not unanimous upon this question. Two of the five judges were absent, and one of those present dissented from the decision.[1]

[1] See, also, Coster *v.* Clarke, 3 Edw. Ch. 428.

CHAPTER XXVII.

DOWER IN LANDS APPROPRIATED TO PUBLIC USES.

1. In the time of Henry III. the Great Charter of King John was so amended as to withhold from the widow the privilege of *quarantine*[1] in the *castle* of her husband.[2] "This," says Lord Coke, "is intended of a castle that is warlike, and maintained for the necessary defence of the realm, and not for a castle in name maintained for habitation of the owner."[3] Although the language of the Great Charter appears to be limited in this particular, to the *quarantine* of the widow, it is nevertheless laid down by the same author above quoted, that a castle necessary to the public defence is not subject to dower. "Of a castle that is maintained for the necessary defence of the realm, a woman shall not be endowed, because it ought not to be divided, *and the public shall be preferred before the private.* But of a castle that is only maintained for the private use and habitation of the owner, a woman shall be endowed."[4] Here we see shadowed forth the principle upon which the courts, at a later day, have proceeded, in holding the inchoate right of dower extinguished in lands appropriated, according to the forms of law, to the uses of the public.

2. The English reports furnish no instance in which the applicability of this principle to the case of lands taken for public uses, is considered; but it appears to have been assumed in the time of Mr. Park, that by such appropriation the right of dower was divested. "It should also be noticed," he says, "as the prevailing impression of the profession, that under enabling acts, such as those of the West India and London Dock Companies, the Grand Junction Canal, and the improvements at Temple Bar, Snow Hill, and Smithfield, the wife's title of dower will be bound by the alienation of the husband,

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[1] See vol. ii. Index, "Quarantine."

[2] First Charter of H. III., ch. 7. See ante, ch. 1, § 16.

[3] 2 Inst. 17.

[4] Co. Litt. 31, b.

although the title is taken by way of conveyance only, and the purchase money is not invested in other lands, or paid into the bank. This is understood to have been the opinion of several gentlemen of high professional reputation, in answer to the requisition of an eminent conveyancer, who, on the behalf of the Corporation of London, had called for fines from vendors whose wives had titles of dower, and the writer believes that the subsequent practice in the great majority of cases has been to dispense with fines."[1] In the United States, however, this question, in different forms, has undergone judicial inquiry on several occasions.

3. The case of Gwynne *v.* Cincinnati was a petition for dower in grounds occupied by a market-house in the City of Cincinnati. The husband, during coverture, in conjunction with other owners of property in the same square, agreed to open a way or street through the square, upon which a market-house was to be erected. This agreement was carried into effect under an ordinance of the city council. The market-house was placed upon that part of the square given by the deceased husband, a space for a street remaining open on each side of the building. It was held that the widow was not entitled to dower. "The whole space," the court observed, "became subject to the same public regulations as the grounds originally laid out in streets, and for other public uses and purposes. The claim of dower must stand upon the same principles that it would stand in any case to the ground thus appropriated. The counsel for the complainants insist that it is a case to be distinguished from that of public grounds condemned for public uses; but the court are unable to comprehend the distinction. When a town is laid out, the law requires the plat to be recorded, and by such record the streets become public highways, and the title to the grounds set apart for public uses, is vested in the county for the purposes contemplated. The uses thus created are inconsistent with the exertion of any private right while the use remains; consequently all private rights must be either suspended or abrogated. Such has been the general understanding, not only in this State, but, so far as we are informed, in other States also. A claim for dower in the streets of a town, or in the public jail, court-house, or public offices, would be a novel one, and if sustained, could not be enjoyed without defeating the original purpose and present use of the grant. It can not be admitted, for the same reason

[1] Park, Dow. 246.

that it is not admitted to a castle in England. It could yield nothing to the support of the widow, by a direct participation in the possession, without such an interference with the public right to control the whole subject, as to render its enjoyment inconvenient and unsafe, if not impossible."[1]

4. In the above case there was no exercise of the right of eminent domain. The title of the public was derived solely from the dedication of the lands to public uses by the husband, and the acceptance thereof by the public authorities. But in Moore *v.* The City of New York,[2] where a similar decision was made, and where the property involved was of great value, the land had been taken by the city authorities, for the purposes of a public market, by virtue of an act of the legislature. Under this act, commissioners of estimate and assessment were duly appointed, who proceeded, in the performance of their duties, and estimated the amounts due to the several owners of the land. Their report was confirmed by the proper authority. The amount awarded to the husband of the claimant for dower, as the entire value of the land belonging to him, required for the market, was paid to him. The law provided that upon the confirmation of the report, the land included in it should vest in the corporation of the city, in fee simple absolute. It was held that by these proceedings the contingent right of dower was divested. "The question which is here presented," the court said, "is whether a wife has such an interest in the premises owned by her husband, while her right of dower is inchoate, as can not be divested by this act of the legislature and the proceedings under it. . . . The right being merely an incident to the marriage relation, it seems to us that while this right is thus inchoate, and before it has become vested by the death of the husband, any regulation of it may be made by the legislature, though its operation is, in effect, to divest the right; the marriage relation itself being within the power of the legislature to modify, or even abolish it. The power of the State to take private property for public uses, results from its right of eminent domain, and that power is not restricted, except by the constitutional provision that just compensation shall be made to the owner. In this case the husband was deemed to be the owner of the entire estate in the land, and the inchoate right of the wife was not considered by

[1] Gwynne *v.* Cincinnati, 3 Ohio, 24.

[2] Moore *v.* The City of N. Y., 4 Sandf. S. C. Rep. 456; S. C. 4 Selden, 110.

the commissioners, and we think justly so, as an interest distinct from that of her husband, as the subject of estimate as to its value, separate from his. Indeed, the value of her interest, such as it was, would seem to be scarcely capable of being estimated as a separate interest. We see no reason to doubt that the commissioners were right in considering the entire estate in these lands as vested in the husband, and that he having been paid the full value of them, the corporation, by force of the act, became seized of the lands in fee simple absolute, discharged of any claim of dower of the wife therein."[1]

5. The case was carried to the Court of Appeals, where the judgment of the Superior Court was affirmed. "The estate of the widow," said Gardiner, J., who delivered the opinion of the court, "after assignment of dower, is a continuation of the estate of her deceased husband. It follows that, while living, he, as owner, is entitled to, and represents the entire fee. This the statute vests, on confirmation of the report of the commissioners, and concludes all those entitled to the land, and all other persons whomsoever. Mrs. Moore, at the time of the proceedings to appropriate the real estate, was not, as we have seen, entitled to it, but her husband; and she was concluded by the general language of the act, if the statute was not in contravention of the provision of the Constitution of the United States, which prohibits the State from passing any law impairing the obligation of contracts. Dower is not the result of contract, but a positive institution of the State, founded on reasons of public policy. . . . In the case under consideration the land was taken against the consent of the husband, by an act of sovereignty, for the public benefit. The only person owning and representing the fee was compensated by being paid its full value. The wife had no interest in the land, and the possibility which she did possess was incapable of being estimated with any degree of accuracy. Under these circumstances the legislature had the power, which I think they have rightfully exercised, to direct that the value of the entire fee should be paid to the husband of the appellant; and that the corporation, by such payment, in pursuance of the statute, has acquired an indefeasible title to the premises."[2] These views were referred to and

[1] Moore v. City of N. Y., 4 Sandf. S. C. Rep. 456, 460.
[2] Moore v. City of N. Y., 4 Selden, 110.

approved by the Supreme Court of Ohio in a case recently determined in that State.[1]

6. The doctrine under consideration has also been extended to the case of lands appropriated by a railroad company for the purposes of their road, under authority of law. This point arose in the case of The Little Miami Railroad Company *v.* Jones,[2] decided by the Superior Court of Cincinnati, in General Term. "By the appropriation of the property in question to the use of the defendants," said Storer, J., "in the mode prescribed by the statute, a perpetual servitude at least, over the premises, was acquired by the railroad company, subject only to be divested by a forfeiture of their corporate franchise on the judgment of a competent court. Until then the unrestricted possession is not only indispensable for the purposes of the road, but is alone consistent with the paramount right of eminent domain which had been imparted by the State through the legislature. This right, which is an attribute of sovereignty, is necessarily paramount to the claim of the private citizen, and when exerted, it compels the owner to part with his estate for a price to be adjudged by a jury, thereby changing his estate from land into money, and as a full price is required to be paid by the constitution of Ohio, without reference to any benefit the contemplated improvement may confer, the condemnation of the land was therefore doubtless intended, as it must necessarily do, to confer the whole title upon the corporation, who have paid the assessed value. Such would be the result where the State should directly assert her power, and appropriate, as she has done, the lands of the citizen for navigable canals, or any other public improvement, and we can discover no reason why the same rule should not hold where the railway company, upon whom the power has been conferred by its charter 'to enter upon and take such real property as should be necessary for the construction of their road,' have exerted that power in the mode defined by law, submitted to the judgment of the court, and receive the possession of the land thereby appropriated. On this hypothesis the husband does not alien his estate, as in the case of a sale to a purchaser, nor is it taken to satisfy his debts, in both of which cases dower would still remain, but he is said to lose his estate, or rather to part with it *in invitum*. He could not have prevented the act of the law transfer-

[1] Weaver *v.* Gregg, 6 Ohio State R. 547. See ante, ch. 16, §§ 27–31.

[2] Little Miami R.R. Co. *v.* Jones, 5 Weekly Law Gaz. n. s. p. 5.

ring his realty, nor yet contest the mode of its execution. An exercise of sovereign power by the body, in which for all the purposes of maintaining civil government, it necessarily rests, which existed before any title to property could be said to pass to individuals, as in case of escheat, it becomes reinvested with his title, and may be therefore said, in some sense, to have originally imparted it, must include within the alienation it compels, the entire title. The land is conveyed, and those who represent it must consequently be deprived of their several rights if they are made parties to the proceeding by which it is appropriated: *a fortiori* where there is no perfect right *in esse*, but the possibility only, of a future claim."[1]

7. The rule fairly deducible from these authorities would seem to exclude dower in all cases where lands are dedicated to the public for a legitimate purpose, and the public have acquired a right to the enjoyment thereof, or where they are lawfully appropriated in virtue of the right of eminent domain. The reasoning of the courts appears to apply as well where lands are granted and used for public parks, public libraries, or other public use of a like character, as where they are devoted to the purposes of a market-place or a public highway. And it is difficult to discern any good ground for a distinction between the two classes of cases.[2] In some of the States burial grounds are expressly exempted from dower by statute.

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[1] Little Miami R.R. Co. *v.* Jones, 5 Weekly Law Gaz. N. S. pp. 5, 7.

[2] 1 Washb. Real Prop. 221, § 37; Walker's Amer. Law, 2d ed. 315. The subject of the legislative power over the right of dower, incidentally considered in the text, will be further treated in the second volume. See Melizet's Appeal, 17 Pa. St. 449; Kennerly *v.* Misso. Ins. Co., 11 Misso. 204; Strong *v.* Clem, 12 Ind. 37; Giles *v.* Gullion, 13 Ind. 487; Noel *v.* Ewing, 9 Ind. 37.

CHAPTER XXVIII.

DOWER AS AFFECTED BY ACTS OF THE HUSBAND PRIOR TO THE MARRIAGE.

§ 1. Alienation before marriage defeats dower.
2–5. Rule where the alienation does not become fully operative until after marriage.
6. Alienation on the day of marriage.
7, 8. Void and voidable conveyances.
9–14. Conveyances fraudulent as to the wife.
15–21. Contracts of sale before marriage.
§ 22, 23. Charges created before marriage.
24, 25. Mortgages executed before marriage.
26–28. Husband's release of equity of redemption of mortgage executed before marriage.
29–33. Judgments recovered before marriage.
34. Leases for life made before marriage.

Alienation before marriage defeats dower.

1. As the wife is only dowable of such estate as the husband was seized or possessed of at some period during the coverture, it follows that any effectual alienation by him prior to the marriage, places the estate beyond the reach of the wife, and prevents a right of dower from attaching in her behalf.[1]

Rule where the alienation does not become fully operative until after marriage.

2. Instances may occur in which an alienation by the husband, though made before the marriage, fails to become fully operative until after the marriage, and yet the right of dower attaching in the interim, be avoided by force of the doctrine of relation. A case put by Sheppard affords an example of this: "If A. bargain and sell his land to B. in fee, and then marry C. and die, and C. is en-

[1] See ante, ch. 1, § 22; Park, Dow. 24, 231. A widow is barred of dower in land conveyed by her husband before the marriage, although the deed has not been registered. Richardson *v.* Skolfield, 45 Maine, 389.

dowed, *and after the deed is enrolled*, in this case the dower of the woman shall be taken away by relation, as was held in Baron Frevil's case, 22 Elizabeth, Co. B."[1] The effect of this doctrine is to make the deed, when enrolled, relate back to the date of its execution, and thus become operative to pass the estate as of that time. Cases in which this principle was applied in the United States, are referred to in a previous chapter.[2]

3. This doctrine also applies to cases of *exchange* of lands at common law. Until the exchange is executed by entry, the seizin remains in the original owners.[3] But if an exchange were made before marriage, the execution of the exchange by entry after marriage would have relation to the time of the exchange made, so as to carry the lands given in exchange free from the title of dower in the wife.[4]

4. So if the husband, prior to his marriage, and without any fraudulent intent, convey his real estate in trust for such use and such person as he shall afterwards appoint by deed or will, and in default of and until such appointment, to the use of himself and his heirs, and should afterwards marry, here, until a proper execution of the power, the wife would be invested with an inchoate right of dower in the estate. But if the husband, during the coverture, should execute the power in due and legal form, the title of the appointee would relate back to the date of the original conveyance, and the dower of the wife would thereby be defeated and avoided.[5]

5. But where the husband, before his marriage, conveyed certain real estate in trust for the payment of his debts, although the trust was not expressed in the deed, but in a separate paper executed by the grantee cotemporaneously with the deed, and the marriage took place before a sale by the trustee, the wife was held dowable of the lands.[6]

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[1] Shep. Touch. 226. See Gilb. Uses, 97; Parker *v.* Bleeke, Cro. Car. 568; ante, ch. 12, §§ 22, 23.

[2] Ante, ch. 12, § 23.

[3] Perk. sec. 369; ante, ch. 12, § 27; ch. 13, §§ 7–11.

[4] Park, Dow. 235.

[5] Link *v.* Edmondson, 19 Misso. 487. See a full discussion of this subject, ante, ch. 14, §§ 9–12.

[6] Doe *v.* Bernard, 7 S. & M. 819. See Hawley *v.* James, 5 Paige, 318.

Alienation on the day of marriage.

6. Where a conveyance is made on the same day of the marriage, although in point of time, before it is solemnized, it is nevertheless held that the wife's claim of dower shall take precedence of the conveyance.[1] The same principle has been extended to a judgment recovered on the day of the marriage, there being no evidence showing which, in fact, was first, the marriage, or the entry of the judgment.[2]

Void and voidable conveyances.

7. In considering the effect upon the right of dower, of conveyances made before the marriage, it is sometimes necessary to distinguish between alienations which are *voidable*, only, and those that are *ipso facto* void; for although the alienation be voidable, yet if it be not avoided during the coverture, there will, of course, be no right of dower. But if the alienation were wholly void, and as a consequence the seizin did not pass to the alienee, but remained in the husband, it would, according to the common law, become subject to the attachment of dower. This question has sometimes arisen in the English courts upon the effect of different modes of alienation by tenants in tail; since, in some cases, an alienation by a tenant in tail is absolutely void, while in others it is voidable only; and consequently the question whether the wife is dowable or not of the estate tail would depend upon the mode of alienation which had been adopted. It is now well settled in England, that if a tenant in tail convey to a man and his heirs by bargain and sale, lease and release, or covenant to stand seized to uses, a base fee passes, commensurate with the time of the estate tail, though defeasible by the issue in tail when their right to the possession accrues.[3] If, therefore, a tenant in tail convey in either of these modes before marriage, as the estate of the bargainee, releasee, or covenantee is good as against the tenant in tail himself, there will be no seizin in him during the coverture. It is admitted, likewise, that where the conveyance operates by transmutation of possession, the tenant in tail may limit the use by way of remainder, even though that remainder

[1] Stewart *v.* Stewart, 3 J. J. Marsh. 48.

[2] Ingram *v.* Morris, 4 Harring. 111.

[3] Machell *v.* Clarke, 2 Ld. Raym. 778; Salk. 619; 11 Mod. 19; Holt, 615; Goodright *v.* Mead, 8 Burr. 1703; ante, ch. 14, §§ 6–8.

can not take effect till after his death; as where it is previously limited to himself for life, remainder to another.[1] It is admitted, also, that although the conveyance do *not* operate by transmutation of possession, the use may be limited by way of remainder, if it may, by possibility, take effect in the life of the tenant in tail, as a bargain and sale or a covenant to stand seized to the use of the covenantee for life, remainder to J. S. in fee.[2] But it is decided[3] that if, on a conveyance by tenant in tail without transmutation of possession, the use is so limited that the remainder can not take effect till after his death, (as to himself for life, remainder to another,) the remainder is void, and as a covenant by tenant in tail to stand seized to the use of himself for life is only good for the sake of remainders, if the remainders are void the whole is void, and he continues seized of his old estate tail. In this case, therefore, the wife would be dowable, although married after the covenant to stand seized, and there are several cases in the old books where it was so determined.[4] This point, however, has rarely occurred, even in the English practice, owing to the almost universal adoption in that country of the mode of making settlements by lease and release to uses.

8. There are cases, also, in which the wife is deprived of her dower although the conveyance by the husband were wrongful and not good in law. As if a man seized in tail general, *discontinues* in fee and takes back an estate in fee simple, and afterwards takes a wife and has issue and dies; the title of dower which attached upon the seizin of the fee is defeated by the remitter of the issue to the estate tail,[5] for the seizin of the fee being cast upon the issue immediately upon the death of the husband, the issue is consequently restored to the estate tail, and thus the seizin of the fee, with all its incidents, is defeated, or, as Lord Coke expressively terms it, is "vanished by the remitter," to the same extent as if the issue had recovered by formedon. So if lands are given to husband and wife in special tail, and they discontinue by fine *sur grant and render* at the common law, and retake an estate in tail general, and have issue, and

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[1] Machell *v.* Clarke, 2 Ld. Raym. 782; Goodright *v.* Mead, 8 Burr. 1708.

[2] Machell *v.* Clarke, 2 Ld. Raym. 782. [3] Ibid.

[4] Heigham *v.* Bedenfield, Noy, 46; Blitheman *v.* Blitheman, Cro. Eliz. 280; S. C. 1 And. 291; Park, Dow. 232–34, and note.

[5] Fitzh. N. B. 149, (F.); Dyer, 41, a. And see 1 Leon. 37, in Partridge *v.* Partridge; Co. Litt. 31, b.; Gilb. Uses, 393; 1 Leon. 66; Park, Dow. 143.

the wife dies, and the husband marries a second wife and dies, in this case, also, the title of dower of the second wife is defeated by the remitter.[1] But it is said that in such case, if a stranger abate upon the death of the husband, the issue may have his election as to which estate he will claim; and if he proceed for the estate of which the wife is dowable, he shall not be remitted, and the wife shall have her dower.[2]

Conveyances fraudulent as to the wife.

9. It is said by Lord Chief Baron Gilbert, that a conveyance in trust, privately made by the husband on the eve of marriage, for the purpose of barring dower, would be deemed fraudulent, as being designed to deprive the wife of the provision given her by the common law.[3] For a similar reason Mr. Justice Wilmot was of opinion in Drury *v.* Drury,[4] that an ante-nuptial jointure made without the wife's privity, would be held fraudulent and void. On the other hand, Lord Hardwicke treats it as clear "that if a man before marriage, conveys his estate privately, without the knowledge of his wife, to trustees in trust for himself and his heirs in fee, that will prevent dower."[5] And in Banks *v.* Sutton[6] it was said that if a a trust were created for the express purpose of barring dower, this would be an additional reason for allowing it to have that effect.[7] In accordance with these views Mr. Park states it to be the rule that an alienation or settlement by the husband, although made immediately before the marriage, and with the express intention of excluding the wife from her dower, would not be impeached as a fraud upon the marital rights of the wife, as in the case of a woman making a settlement of her estates, unknown to her intended husband, on the eve of marriage.[8] And in Ex parte Bell,[9] it was held that a volun-

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[1] Bro. Dow. pl. 14. [2] Hughes, Writs, 152. [3] Lex Pret. 267.

[4] Drury *v.* Drury, 3 Bro. Parl. Ca. octavo ed. p. 492; 2 Eden, 60; Wilmot's Opinions, 177; 4 Bro. C. C. 506, n.

[5] Swannock *v.* Lyford, Co. Litt. 208, a., n. 1; Ambl. 6; S. C. under the name of Hill *v.* Adams, 2 Atk. 208; Park, Dow. 375, 382; 1 Washb. R. P. 161, § 13.

[6] Banks *v.* Sutton, 2 P. Wms. 700.

[7] See, also, Bottomley *v.* Fairfax, Prec. Ch. 336, and Show. Parl. Cas. 71; 1 Roper, Husb. and Wife, by Jacob, 354, note.

[8] Park, Dow. 236. See, also, pp. 375–85, where the opinion of Lord Hardwicke in Swannock *v.* Lyford is given. Atherley on Marriage Sett. 328, 329.

[9] Ex parte Bell, 1 Glyn & J. 282.

tary settlement made by the husband, though afterwards set aside as fraudulent against creditors, prevents his wife's right of dower from arising. It has been remarked "that the reasons for which it has been held that a conveyance privately made by a woman during the treaty of marriage is prima facie fraudulent and void, do not apply with equal force to a conveyance made under similar circumstances by the intended husband. Since estates are now most commonly conveyed or settled so as to prevent dower from attaching, it is not necessarily to be presumed that the marriage was contracted by the woman in the expectation of becoming entitled to that provision, unless it appears that representations to that effect were made to her."[1]

10. This reasoning can hardly apply in the United States, where the formalities of the English practice with regard to conveyancing prevail but to a limited extent, and where settlements for the purpose of avoiding dower are seldom made. Accordingly, although the decisions upon the subject are not entirely uniform, the weight of authority appears to be with the proposition that a conveyance made by the husband, on the eve of marriage, for the purpose of defrauding his intended wife of her dower estate, will, as against the grantee or a purchaser from him with notice, be treated as void as to her, and she may maintain her claim to endowment precisely as if no conveyance had been made.[2]

11. Thus, in Swaine *v.* Perine,[3] the husband, just before his marriage, and on the same day, executed to his daughter by a former marriage, a deed of the premises in which dower was claimed. The deed was without valuable consideration, was fraudulent in fact, had been kept concealed, and was not accompanied by possession. It had been determined in a proceeding instituted previously to that of the widow, that the deed was fraudulent and void as against a subsequent mortgagee,[4] and the chancellor adjudged it to be equally fraudulent as against the widow. It is to be observed, that upon the authority of some of the adjudged cases, the claim of the widow to

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[1] 1 Roper, Husb. and Wife, by Jacob, 354, note.

[2] Cranson *v.* Cranson, 4 Mich. 230; Swaine *v.* Perine, 5 John. Ch. 482; Petty *v.* Petty, 4 B. Mon. 215, 217; Littleton *v.* Littleton, 1 Dev. & Batt. 327. And see Rowland *v.* Rowland, 2 Sneed, 543; contra, Baker *v.* Chase, 6 Hill, 482. See, also, Whithed *v.* Mallory, 4 Cush. 138.

[3] Swaine *v.* Perine, 5 John. Ch. 482, 489.

[4] In Perine *v.* Dunn, 3 John. Ch. 508.

dower might have been sustained upon the ground that as the marriage and the conveyance were both upon the same day, the dower right should take the precedence.[1]

12. In Cranson *v.* Cranson,[2] the husband, shortly before his marriage, and without valuable consideration, executed to his sons a deed of his lands. It was held that this deed was no bar to the dower of his widow. So in Kentucky, where a man advanced in life, having children by a former wife, contracted a second marriage, and two days before the marriage, conveyed to his children by the first marriage, all his land, slaves, and personalty, without the knowledge of the intended wife, reserving a life estate to himself, it was held that the chancellor, on the bill of the wife, even before the death of the husband, might declare the conveyance void, so far as it deprived her of dower in the land, in case she survived him.[3] And in North Carolina, under the act of 1784, a conveyance by a husband before marriage to defeat his wife's dower was adjudged void.[4] But an advancement to the children of the first marriage, made before a second was contemplated, is not a fraud upon the second wife's right of dower; and this as well where she was ignorant of the deed before marriage, as where she was informed of it.[5]

13. But in Baker *v.* Chase,[6] the Supreme Court of New York refused to follow the ruling of the chancellor in Swaine *v.* Perine. In that case it appeared that the husband, two days before his marriage with the plaintiff, conveyed the lands in which dower was claimed, to one of his children by a former marriage, as an advancement, with the intention of preventing the plaintiff from acquiring a right of dower therein, and that she knew nothing of the conveyance until after the marriage had taken place. It was held, however, that the conveyance was valid. "The plaintiff's case," said Bronson, Judge, "at the most, only amounts to this: Royal Chase conveyed a part of his real estate, by way of advancement, to his son Peter, with the intention of defeating the right to

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[1] Stewart *v.* Stewart, 3 J. J. Marsh. 48; Ingram *v.* Morris, 4 Harring. 111. See ante, § 6.

[2] Cranson *v.* Cranson, 4 Mich. 230.

[3] Petty *v.* Petty, 4 B. Mon. 215, 217.

[4] Littleton *v.* Littleton, 1 Dev. & Bat. 327; Tate *v.* Tate, 1 Dev. & Bat. Eq. 22.

[5] Tate *v.* Tate, 1 Dev. & Bat. Eq. 22. See, also, Gaines *v.* Gaines, 9 B. Mon. 295; Firestone *v.* Firestone, 2 Ohio St. 415.

[6] Baker *v.* Chase, 6 Hill, 482.

dower which would otherwise vest in the plaintiff, in case the contemplated marriage should take place, and she should survive her husband; and the plaintiff married without knowing of the conveyance. What a court of equity might say about such a fraud as that, I will not undertake to determine; but notwithstanding the case of Swaine *v.* Perine, (5 John. Ch. 482,) I think the court would say that there was no fraud in the matter. But however that may be, we have not been referred to any case, nor have I met with any, where a court of law has undertaken to set aside a deed upon this ground. The husband was not seized at any time during the coverture, and if the plaintiff can succeed anywhere, she can not in a court of law." One feature of this case should not be overlooked. The husband, at the time of the conveyance, was seized of lands of the value of some seven or eight thousand dollars, and the premises in question were estimated to be of the value of nine hundred dollars, only. It would hardly be claimed that every conveyance made in contemplation of marriage, however insignificant the proportion of the estate conveyed, should be adjudged fraudulent as to the wife. A parent might well be desirous to advance to his son some reasonable proportion of his estate, and he might, also, with entire propriety, wish the son to enjoy such advancement free from the incumbrance of dower. The question, therefore, it would seem, should be determined with reference to all the circumstances of the particular case. If the premises conveyed, when compared with the entire estate of the husband, do not exceed a reasonable advancement from a father to his son, and there were no purpose of fraud, but simply a desire to pass an unincumbered title, it would seem hardly just to pronounce the conveyance fraudulent as to the wife, and defeat the reasonable intention of the grantor.[1]

14. In Whithed *v.* Mallory,[2] the husband, more than two years prior to his marriage, executed a conveyance of his lands without consideration, for the purpose of defrauding creditors. It was held that although the creditors might avoid the conveyance, yet that no right of dower existed in the wife. "A voluntary conveyance, made to defeat creditors," said the court, "is not absolutely void, but only voidable; it is good as against the grantor and his heirs. It can

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[1] See post, ch. 29, § 31; Gaines *v.* Gaines, 9 B. Mon. 295; Firestone *v.* Firestone, 2 Ohio St. 415; post, § 21.

[2] Whithed *v.* Mallory, 4 Cush. 138.

only be avoided by creditors, and by them only to an extent sufficient to satisfy their debts. The surplus, if any, remains good to the grantee." In this case, it will be observed, the conveyance was not made in contemplation of, but long before marriage, and no purpose of defeating dower existed in the mind of the grantor. There was no fraud, therefore, committed upon the wife, and she had no higher claim upon the estate than the husband himself.

Contracts of sale.

15. The general doctrine is that the wife's dower is liable to be defeated by every subsisting claim or incumbrance in law or equity, existing before the inception of her right, and which would have defeated the husband's seizin.[1] Upon this principle, if a man make a contract for the sale of his land, and afterwards, and before conveyance made, marry, he is regarded in equity as a trustee for the purchaser, and if the conveyance be made during the coverture in execution of the contract, the purchaser takes the estate discharged of dower.[2] The rule is the same if the husband die without having conveyed the land, and a specific performance of the contract is enforced against his heirs.[3]

16. The doctrine above stated has received general approbation in the American courts.[4] In Kentucky it has been applied in a number of cases,[5] and is carried into the present statute of that State.[6] The point has also been determined in Maryland,[7] Ohio,[8] and Indiana.[9]

17. In 1789, A. in consideration of his mother's agreement to pay

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[1] 4 Kent, 50.

[2] Ibid.; Park, Dow. 106; 1 Roper, Husb. and Wife, by Jacob, 358. See ch. 19, § 30.

[3] Ibid.; Adkins *v.* Holmes, 2 Carter, 197, 199; Kintner *v.* McRae, Ibid. 453.

[4] In the early case of Braxton *v.* Lee, 4 Hen. & M. 376, the court appear to have entertained strong doubts upon this point. The case, however, did not call for a decision of the question, and later cases have authoritatively established the rule as stated in the text.

[5] Dean *v.* Mitchell, 4 J. J. Marsh. 451; Oldham *v.* Sale, 1 B. Mon. 76; Gaines *v.* Gaines, 9 B. Mon. 295. See, also, Heed *v.* Ford, 16 B. Mon. 114; Gully *v.* Ray, 18 B. Mon. 107.

[6] Rev. Stat. Ky. art. 4, ch. 47, § 6; Rev. by Stanton, vol. ii. p. 26, § 6.

[7] Rawlings *v.* Adams, 7 Md. 26; Bowie *v.* Berry, 3 Md. Ch. Decis. 359; Cowman *v.* Hall, 8 Gill & J. 398.

[8] Firestone *v.* Firestone, 2 Ohio St. 415.

[9] Adkins *v.* Holmes, 2 Carter, 197; Kintner *v.* McRae, Ibid. 453.

him £100 over his share of his deceased father's personal estate, also to pay all the debts of the estate, and to procure certain lands to be conveyed to him in fee, agreed, upon his part, to convey to her or her heirs, or to such of the younger children of the family, his brothers and sisters, as she should from time to time appoint, or to their heirs, certain other lands of which he was seized. A few days after the execution of this agreement he married. Upon bill filed in 1826 by his widow for dower, it appeared that the lands which he agreed to convey, were, from the time of the execution of the agreement, in the possession of his mother; that in 1807, he, with his mother, executed deeds therefor to certain of his brothers, the defendants; and that the deeds and the agreement were put on record at the same time. It was held that there was sufficient evidence that the mother had complied with the terms of her agreement, and that she was entitled to the conveyance from A. clear of any claim for dower on the part of his widow.[1]

18. But where a sale was made, and a bond to convey given, and a part of the purchase money received before marriage, and a conveyance was executed after the marriage, the purchaser giving back a mortgage to secure the balance of the purchase money, it was held that the widow of the vendor was entitled to dower, *at law*.[2]

19. In Firestone *v.* Firestone,[3] the husband, before marriage with the claimant in dower, for considerations partly good and partly valuable, agreed to convey certain lands to his son, who paid the valuable consideration and took possession, and after the marriage a conveyance was actually made. It was held that no right of dower attached as against the equity of the son.

20. So if a vendor who has made a contract of sale before marriage, upon default of the purchaser, enforce his lien and cause the land to be sold after marriage, in satisfaction of the amount due him, the purchaser at such sale takes the land discharged from any claim of dower on the part of the wife of the vendor. In Kintner *v.* McRae,[4] in which this point was decided, the court said: "If the land had been sold by Kintner (the vendor) before his marriage, and the purchase money paid by Bines (the first purchaser) after the mar-

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[1] Cowman *v.* Hall, 8 Gill & J. 398.

[2] Dimond *v.* Billingslea, 2 Har. & Gill, 264.

[3] Firestone *v.* Firestone, 2 Ohio St. R. 415.

[4] Kintner *v.* McRae, 2 Carter, (Ind.) 453.

riage, it would have been clear of dower, and the case made by the facts on the record is substantially the same. It is true, the failure of Bines to pay his notes when they became due, may have put Kintner in a position to either rescind or enforce the contract at his election, but he could not do both, and he did enforce payment by a suit. The case stands, then, as if Bines, purchasing the lands before Kintner's marriage, had, either voluntarily or upon compulsion, paid a balance of the purchase money after the marriage. If he had done so, he could, of course, have required and compelled Kintner, or his representatives, to make him a title, which would have been clear of any claim from dower arising from such marriage. We do not see any reason why McRae, as the purchaser of Bines's interest, sold at the instance of Kintner, for the express purpose of enforcing payment of the purchase money, should not be entitled to stand in the same position; and it will scarcely be contended that the vendor of land, who agrees to give a credit for part of the purchase money, and to make a title when the whole shall be paid, can, by a marriage before the whole purchase money becomes due, impair or alter his contract with the vendee, by incumbering the land with the right of dower."[1]

21. It is held, also, to make no difference that the sale was by parol, or that the vendor was an infant at the time of entering into the contract, provided it be confirmed by a conveyance duly executed during the coverture.[2] "We are of opinion," the court say, in the case cited, "that the verbal sale by Richard Oldham, not being void, but voidable, only, he alone had a right to avoid or confirm it during his life, and having confirmed it by the conveyance of 1809, his wife never had any equitable interest of which she could not have been divested without her own concurrence. The infancy of Richard Oldham when he first sold his interest to Churchhill, did not render that executory agreement void, but voidable, only. . . . . Consequently, as the verbal sale by Oldham was valid until avoided, the fact that there was no written memorial of it, had no other effect on it than the other fact of his infancy at the date of it, and which only furnished ground for avoiding it if he elected to do so before a confirmation. . . . . And therefore, as he, in good faith, only executed after his marriage, an ante-nuptial contract transferring his bene-

[1] And see Adkins *v.* Holmes, 2 Carter, (Ind.) 197.

[2] Oldham *v.* Sale, 1 B. Mon. 76.

ficial interest in the lot, and which contract he could not either honorably or justly have avoided, his deed of conveyance had relation to the date of that executory agreement, and overreached, or rather extinguished her initiate right to dower." In Gaines *v.* Gaines,[1] it was decided by the same court that the principle excluding dower in these cases applies also where a *bona fide gift* of lands is made before coverture, to a child by a former marriage, who takes possession and makes improvements, claiming the lands as his own, and receives a conveyance from the donor after the second marriage of the latter.

But in the case of a sale of lands before marriage, if the vendee neglect to make payment, and the vendor during his lifetime, or his representatives after his death, elect to rescind the contract, instead of going for a specific performance, the beneficial interest of the vendor in the lands will revest in him in the one case, and in his heirs in the other, and his wife consequently be entitled to dower.[2]

Charges created before marriage.

22. It is obvious that, as the husband may, by aliening his lands at any time before marriage, altogether intercept the title of dower, and prevent it from ever arising, he may, under the same circumstances, create derivative interests or charges which shall be good against the wife when her title to be endowed is complete by his death. Thus his leases,[3] his statutes, or recognizances[4] are all binding on the wife, and she will hold the lands assigned her in dower, subject to them; and although the husband was tenant in tail, and made a lease unauthorized by the statute, yet it will be binding upon the wife.[5]

23. It may, however, be observed, as incidental to this point, that if the husband, previous to marriage, acknowledge a statute or recog-

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[1] Gaines *v.* Gaines, 9 B. Mon. 295. See, also, Firestone *v.* Firestone, 2 Ohio St. 415.

[2] Kintner *v.* McRae, 2 Carter, (Ind.) 458; Dean *v.* Mitchell, 4 J. J. Marsh. 451.

[3] Eng. Lutw. 230; Winch, 80; Wheatley *v.* Best, Cro. Eliz. 564; Co. Litt. 32, a.; Stoughton *v.* Leigh, 1 Taunt. 410.

[4] Jenk. Cent. p. 36.

[5] 2 Prest. Conv. 132; Park, Dow. 162. And see Earl of Bedford's case, 7 Co. 67, 9, a. In Kentucky it is provided by statute that the wife shall not have dower, where a sale is made after marriage to satisfy a lien or incumbrance created by the husband before marriage, except as to the surplus, when not disposed of by the husband. Sec. 6, art. 4, ch. 47, Ky. Rev. St. 393; Stanton's Rev. vol. ii p. 26, § 6.

nizance, and afterwards die, leaving his heir within age, and *part* of the land is assigned to the wife for her dower, it shall not be extended during the non-age of the heir; for all the land is liable *pro rata;* and as the land of the heir within age can not be charged, so neither shall the land of the dowress, for otherwise the whole burden would fall upon her. But if *all* the land should be assigned her for her dower, it would be liable to be extended during the minority of the heir.[1] And it seems, even in the former case, that the non-age may be relieved against in equity.[2]

Mortgages.

24. Where the husband has mortgaged his lands at a date anterior to the marriage, his wife is dowable only of the equity of redemption. This rule is sufficiently discussed and explained in a previous chapter.[3]

25. In cases of this character the dower interest of the wife is subject to the incumbrance,[4] and if there be a foreclosure or sale under the mortgage after the marriage, her interest in the lands is entirely extinguished, although, as we have seen, she may, as a general rule, be dowable of the surplus, if any, remaining after satisfying the mortgage debt.[5] And where it was provided by statute that a widow's dower should not be considered as sold or extinguished by a sale of the husband's property by virtue of any decree, execution, or mortgage to which she was not a party, this enactment was held to have no relation to decrees or other incumbrances existing previously to the marriage.[6] But while a court of chancery will make the security available to the mortgagee, it will also take care

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[1] Jenk. Cent. pp. 86, 87.

[2] Middleton *v.* Shelly, 1 Lev. 197, 198; Park, Dow. 286, 287.

[3] Ch. 23; Heth *v.* Cocke, 1 Rand. 344; Reed *v.* Morrison, 7 Serg. & R. 18; Smith *v.* Eustis, 7 Greenl. 41; Carll *v.* Butman, Ibid. 102; Hartshorne *v.* Hartshorne, 1 Green's Ch. 349; Montgomery *v.* Bruere, 1 South. 260. Dower can not be claimed by the widow of the son in opposition to a lien by act of assembly, which bound the land in the lifetime of the father. Lane and Wife *v.* Gover, 8 Har. & McH. 394.

[4] Mantz *v.* Buchanan, 1 Md. Ch. Decis. 202; McMahan *v.* Kimball, 3 Blackf. 1; Fry *v.* Merchants' Ins. Co., 15 Ala. 810; Davidson *v.* Graves, 1 Bailey's Ch. 268; Newton *v.* Cook, 4 Gray, 46.

[5] Ante, ch. 28, §§ 24, 25, and cases there cited; Nottingham *v.* Calvert, 1 Ind. 527; 1 Washb. Real Prop. 203, § 17; 4 Kent, 45; Chew *v.* Farmers' Bank, 9 Gill, 361.

[6] McMahan *v.* Kimball, 3 Blackf. 1. See Cunningham *v.* Knight, 1 Barb. 399.

that the interest of the widow is not affected more than may be necessary to protect the mortgage debt, and insure its payment.[1]

Release of the equity of redemption during coverture by the husband alone.

26. In Jackson *v.* Dewitt,[2] the husband purchased lands prior to his marriage, and received a deed therefor, and at the same time gave back a mortgage to secure the payment of a portion of the purchase money. After his marriage he reconveyed the lands to the mortgagee in satisfaction of the purchase money yet remaining unpaid, his wife not joining in the conveyance. She survived him, and the question arose whether she was entitled to be endowed of the premises. The court held adversely to her claim. "From the case of Stow *v.* Tifft, 15 John. 458," remarked Woodworth, Judge, in delivering the opinion of the court, "it is evident that, up to the time that Depuy released, his wife could have no claim of dower; for the husband had an instantaneous seizin, only. If the release operated as a discharge of the mortgage merely, the widow became entitled to dower, the husband being considered as having been seized *ab initio*. 6 John. 294. But there was no actual payment of the mortgage, leaving the husband seized. There was a merger, by which, it is true, the mortgage was satisfied; but the same act annihilated the mortgagor's title. There was not a moment of time between the discharge of the mortgage, and the vesting of the title in the mortgagee. It was all done *uno flatu*. If, then, no right of dower existed the moment previous to the merger, (and clearly there did not,) and if the release extinguished all the title the mortgagor ever had, it follows that there never was an instant of time in which the widow was entitled to dower."[3]

27. In Rands *v.* Kendall,[4] a mortgage given by the husband had become absolute before his marriage, and during the coverture he executed a release of the equity of redemption to the assignee of the mortgagee, and it was held that the dower of his wife was thereby defeated. This decision was placed upon the ground that, by reason of the forfeiture of the condition of the mortgage, the husband, at

[1] Fry *v.* Merchants' Ins. Co., 15 Ala. 810.

[2] Jackson *v.* Dewitt, 6 Cow. 316.

[3] And see 4 Kent, 45; Cunningham *v.* Knight, 1 Barb. 399.

[4] Rands *v.* Kendall, 15 Ohio, 671.

the date of the marriage, as against the mortgagee, had but an equity in the land, which it was in his power to surrender by his individual act during coverture, the statute of that State giving dower in such equitable estates only as the husband was possessed of at the time of his death. "Complainant's counsel contend," say the court, "that as it [the mortgage] was a simple security for the payment of a debt, the mortgage is a mere incident to the debt, and that although the condition is broken, yet that the legal title to the land remains, as before, in the mortgagor. The modern decisions and the decisions of this court, to a certain extent, favor this opinion. It has been repeatedly held that an execution might be levied on the land, the mortgagor being in possession; that the mortgagor was to be considered as having the legal title. But it has never been so held but with this restriction; that as between the parties to a mortgage, the deed, after condition broken, becomes absolute. As to all the world but the parties, the legal title is considered as in the mortgagor; but as between the parties and those claiming under them, the legal title is vested in the mortgagee. I think I am not mistaken in saying that such has been the uniform language of the court; and therefore it is, that after condition broken, the mortgagee may recover the possession of the land in an action of ejectment. Without the legal title he could not so recover. Such being the law, it follows, that the condition being broken by the non-payment of the interest, which fell due on the 24th April, 1824, the legal title then became, as between Ferguson and Coleman, vested in Ferguson, and was never afterwards vested in Coleman. It was after this period that his marriage with Rachel Rand took place, and during the coverture he had not an estate of inheritance in the land in which dower is demanded. . . . . Having but an equity, he could transfer it by his own deed, and thereby defeat his wife of dower." Read, J., delivered an able dissenting opinion, in which, upon a full review of the authorities, he maintained that by the settled law, the mortgagee, even after condition broken, and until foreclosure, is regarded at law as well as in equity, as a mere creditor, having a specific lien on the property for the payment of his debt. He insisted, as a necessary result of these premises, that in the case under consideration, the husband, during the coverture, was seized of an estate of inheritance within the meaning of the act relating to dower, and consequently that the widow was entitled to a decree.

28. The doctrine of the foregoing cases is opposed to the general

current of authority. In Lund *v.* Woods,[1] lands were conveyed to the husband during the coverture, subject to an outstanding mortgage. He subsequently released the equity of redemption to the mortgagee, the wife not joining. It was held that she was not barred, but might claim dower upon redeeming the lands. So in Van Duyne *v.* Thayre,[2] the husband mortgaged the premises *before* coverture, and released to the heirs of the mortgagee after the marriage, his wife not joining. Her right to be endowed in equity, upon redeeming the mortgage, was not denied. In speaking of the case of Jackson *v.* Dewitt, the court, in Wheeler *v.* Morris,[3] used this language: "The defendant in ejectment was in possession under the title of the mortgagee, and it was held that the widow of the mortgagor could not maintain the action to recover her dower. The ruling must have been the same had that been a case in which her husband had been a purchaser of the premises subject to the mortgage. All, therefore, which was necessarily involved in, or decided by, these cases, was, that the conveyance to the husband, who gave back a mortgage for purchase money, did not give him such a seizin that the right of dower of the wife attached, intermediate the deed and the mortgage; and therefore that she could not maintain an action *at law* against the mortgagee, or those claiming under him. As against them, she was not entitled *at law* to dower." The point was more elaborately discussed in Mills *v.* Van Voorhis.[4] "Both these cases, indeed," the court observed, referring to Jackson *v.* Dewitt and Stow *v.* Tifft,[5] "differ from the present, in that the mortgage in each of them was executed *before* the marriage; but I am unable to see how that fact can affect the question, or weaken the application of the reasoning of the court. If the husband, upon a conveyance to him for a consideration which he at the time executes a mortgage to secure, in whole or in part, obtains no seizin which is dowable at all, and acquires no estate out of which his wife or widow can be endowed, for the want of any actual or legal seizin, until the mortgage given for the purchase money is satisfied, then, evidently, the rule and the result must be the same, whether the mortgage be executed during the coverture, or before. But we are all agreed that the

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[1] Lund *v.* Woods, 11 Met. 566.

[2] Van Duyne *v.* Thayre, 19 Wend. 162.

[3] Wheeler *v.* Morris, 2 Bosw. 524, 531.

[4] Mills *v.* Van Voorhis, 23 Barb. 125; S. C. 20 N. Y. (6 Smith,) 412.

[5] Jackson *v.* Dewitt, cited ante, § 26; Stow *v.* Tifft, 15 John. 458.

doctrine of these cases is erroneous. Jackson *v.* Dewitt was indeed correctly decided. That was ejectment for dower by the widow against the tenant of a mortgagee for purchase money to whom the husband had released his equity of redemption. Obviously, all that was necessary to sustain the decision of the court against the plaintiff in that case, was to hold that the mortgage was still outstanding as to the widow; and since she could not, of course, have dower against, and in preference to the mortgage, she could not bring an action at law against the mortgagee in possession, nor claim her dower, without contributing justly to the redemption of the mortgage to which it was subject. The doctrine of instantaneous seizin was laid down in reference to, and for the benefit and protection of the mortgagee for the purchase money when the wife did not sign the mortgage. As to him, and his mortgage, the mortgagor had no seizin of which his wife can be endowed. But as to all the world beside, in this, as in every other case of a mortgage, the equity of redemption is the legal estate in the land, and the mortgage is simply a security for money. As long as this is so, and the mortgage is not regarded as a reconveyance of the title and estate, dower must attach to such equity of redemption, subject to the prior rights and equities of the mortgagee."[1]

Judgments.

29. Where a judgment lien is acquired against the husband's land prior to his marriage, and the land is sold subsequently thereto in satisfaction of the judgment debt, the right of dower of his wife in the land is defeated.[2] And in one case it was decided that the arrest of the husband on a *ca. sa.* issued before the marriage, did not prevent the

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[1] Accord. 1 Washb. on Real Prop. p. 181, § 14. This author justly observes: "It is apprehended that in those States where the mortgagor is regarded as the holder of the legal estate with its incidents, and the interest of the mortgagee as a lien or pledge, only, for his debt, the right of dower in such a case would attach in respect to the mortgagor's estate, the equity of redemption, which he could not, by his own deed alone, defeat." See, also, post, ch. 29, § 43.

[2] Robbins *v.* Robbins, 8 Blackf. 174; Whitehead *v.* Cummins, 2 Carter, (Ind.) 58; Queen Anne's Co. *v.* Pratt, 10 Md. 5; Sandford *v.* McLean, 3 Paige, 117; Brown *v.* Williams, 31 Maine, 403. See, also, McMahan *v.* Kimball, 3 Blackf. 1; Bisland *v.* Hewett, 11 S. & M. 164; Wilson *v.* Davisson, 2 Rob. Va. 398. By the Kentucky statute, where a sale is made after marriage to satisfy a lien or incumbrance created before marriage, the wife's dower in the land is divested. Ky. Rev. Stat. ch. 47, art. 4, § 6.

application of this rule.[1] Nor is the wife permitted to avail herself of such irregularities or informalities in the proceedings connected with the sale, as do not render it void.[2] Where lands are taken in attachment before the marriage, but there is no judgment until after the marriage, a subsequent sale under the judgment, and in virtue of the proceedings in attachment, is governed by the same rule, and the wife of the judgment debtor has no dower.[3] But where the judgment is entered on the same day of the marriage, and no previous lien was acquired, the dower right of the wife is protected, and the judgment is made subordinate thereto.[4]

30. It was held in Georgia, that where the land is not sold during the lifetime of the husband, although judgment was recovered prior to the marriage, and the husband's estate is insolvent, the wife is, nevertheless, dowable. Although the judgment constitutes a lien upon the land, the husband's seizin is not divested until a levy and sale in the manner pointed out by law, and consequently the right of dower is not defeated.[5]

31. And it is settled that until a sale is actually made under the judgment, the widow may have dower assigned her, subject thereto. This point was determined in Robbins *v.* Robbins.[6] "The judgment liens," the court remarked in that case, "as they did not affect the seizin of the husband, did not destroy the right of the widow to dower. It is true, that as the liens existed at the time of the marriage, the widow must take her dower subject to them. The judgment creditors, by enforcing their liens may dispossess her; but her right is good against every other person." In Sandford *v.* McLean,[7] the chancellor made the following observations on the subject of the wife's dower where there are outstanding judgments recovered before the marriage: "If the widow should be compelled to pay off the prior judgments to save her dower, she might have an equitable claim to be substituted in the place of the judgment creditors, with the right to collect the amount back again out of the estate which

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[1] Queen Anne's Co. *v.* Pratt, 10 Md. 5. [2] Ibid.

[3] Brown *v.* Williams, 31 Maine, 408.

[4] Ingram *v.* Morris, 4 Harring. 111. The same principle is applied to conveyances. Stewart *v.* Stewart, 8 J. J. Marsh. 48. See ante, § 6.

[5] Green *v.* Causey, 10 Geo. 485. The question whether the widow took her dower subject to the incumbrance of the judgment, was not made in the record, and was left undetermined.

[6] Robbins *v.* Robbins, 8 Blackf. 174. [7] Sandford *v.* McLean, 3 Paige, 117.

her husband had at the time of the marriage, exclusive of her dower therein. And if the creditors have released the interest of the husband from the operation of the judgments, so that she can not protect herself by a substitution, perhaps a court of equity would not allow them to sell her dower right in the land to satisfy their debts."

32. In Whitehead *v.* Cummins,[1] certain judgments were in force against the husband, and a lien upon his lands at the time of the marriage. Subsequently, additional judgments were recovered against him, and executions issued thereon, and levied upon the same lands. After his death the real estate was sold by virtue of the executions on the junior judgments, the purchaser bidding and paying the full value of the property, with an understanding by all parties concerned, that the money so bid and paid should be applied, first, in payment of the elder, and secondly, of the junior judgments, and the money was so applied. It was held that the purchaser might be subrogated to the rights of the elder judgment creditors as against the widow of the debtor, and that she must either contribute to the payment of those judgments, or receive dower in the residue only of the real estate, after deducting from its fair value the amount of such judgments. "Her dower in the lands described," the court said, "is to be limited to the value of those lands, over and above the incumbrances on them at the time of her husband's death, which were placed there before marriage. This is the dower to which, we think, equity entitles her, and to which Whitehead bought subject. This she must take, or contribute ratably, according to the established rules of law to the discharge of those incumbrances." And the estate being insolvent, the court further held that the personal representative of the deceased was not required to redeem any portion of the incumbrances from the personal assets, for the benefit of the widow.

33. Where a sale is made after the death of the husband, and it produces more than the amount required to satisfy the judgment, the widow is entitled to dower in the surplus.[2]

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[1] Whitehead *v.* Cummins, 2 Carter, (Ind.) 58.

[2] See Robbins *v.* Robbins, 8 Blackf. 174; Sandford *v.* McLean, 3 Paige, 117. By the Kentucky statute, where lands are sold after marriage to satisfy a lien acquired before marriage, the wife may be endowed of the surplus in all cases where the husband has not disposed of it in his lifetime. Ky. Rev. St. ch. 47, art. 4, § 6.

Leases for life.

34. If the husband, before the marriage, make a lease of his lands for the life of the lessee, or of some third person, the wife will not be dowable unless the life estate terminate during the coverture.[1] If the lease be for the husband's own life, it follows that as it can not end until the coverture itself ceases, no right of dower will arise in any event.[2]

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[1] See ch. 11, § 5; ch. 15, § 1; ch. 17, §§ 1–9.

[2] Ch. 17, §§ 1–9.

CHAPTER XXIX.

DOWER AS AFFECTED BY ACTS OF THE HUSBAND DURING THE COVERTURE.

§ 1–3. At common law, dower can not be defeated by the husband after it has once attached.

4, 5. Exceptions to this general rule.

6, 7. Instances in which the wife is concluded from avoiding the acts of the husband.

8–15. Wife may avoid collusive recovery against the husband.

16, 17. Stat. 3 & 4 Will. IV. ch. 105.

18. Statutory changes in the United States rendering the concurrence of the wife unnecessary to divest dower.

19, 20. The rule in Connecticut.

21, 22. Vermont.

23–26. North Carolina.

27–31. Tennessee.

§ 32, 33. The rule in Georgia.

34. Mississippi.

35. New Hampshire.

36–40. Pennsylvania.

41. States in which the common law rule is retained.

42. Execution of contract of sale made prior to the marriage.

43. Husband's release of equity of redemption of mortgage executed during the coverture.

44. Sale of equity of redemption on execution against the husband.

45. Mechanics' lien.

46–54. Forfeiture by reason of the husband's crime.

At common law, dower can not be defeated by the husband after it has once attached.

1. After the right of dower has once attached, it is not in the power of the husband alone to defeat it by any act in the nature of an alienation or charge.[1] It is a right attaching in law, which, although it may possibly never become absolute, (as if the wife die in the lifetime of the husband,) yet, from the moment that the facts of marriage and seizin concur, is so fixed on the land as to become a title paramount to that of any person claiming under the husband by subsequent act.[2] The alienation of the husband, therefore, whether

[1] Benson *v.* Scot, 3 Lev. 385, 386. For the rule upon this subject in the time of Glanville, see ante, ch. 1, § 23, and note.

[2] Co. Litt. 32, a.; Fitzh. N. B. 147, (E.)

voluntary, as by deed or will; or involuntary, as by bankruptcy or otherwise, will confer no title on the alienee as against the wife in respect of her dower, but she will be entitled to recover against such alienee, (except as to damages,) in the same manner, as she would have recovered against the heir of the husband, had the latter died seized.[1]

2. It is a necessary consequence of this rule that all charges or derivative interests created by the husband, subsequent to the attachment of the wife's right, are voidable as to that part of the land which is recovered in dower. As if "tenant in fee simple take a wife, and then make a lease for years and dieth, the wife is endowed; in this case she shall avoid the lease, but after her decease the lease shall be in force again."[2] So if the husband, after marriage, acknowledge a statute or recognizance, the wife shall nevertheless hold her dower discharged from its operation.[3] And it may be added that, as the heir can be in no better situation than the husband, it follows that all charges made by him in the interval between the death of the husband and the assignment of dower, will be void as against the dowress, and in no degree affect her interest.[4]

3. As the husband can not defeat his wife's dower by any alienation of the land by himself alone, so neither can he bind her by any modification of the nature of the seizin, nor by any merger or extinguishment produced by his own act without her concurrence. All such acts on his part will take effect *sub modo*, and be liable to be avoided as to the estate of the dowress.[5] The following examples, taken from the old books, though of but little practical value at this day, will serve to illustrate this principle. If a person having a seignory marry, and afterwards purchase the tenancy in fee; or if the owner of a rent-charge purchase the land out of which the rent is issuing, the widow shall have her election to be endowed in the one case, either out of the seignory or the tenancy, and in the other, either of the rent or the land.[6] The land might, indeed, be so conveyed as not to confer a seizin on the husband on which a title of dower could attach, and in that case, there could, of course, be no election; but it is clear that the widow might demand her dower of

[1] Park, Dow. 237, 238.
[2] Shep. Touch. 275; Stoughton v. Leigh, 1 Taunt. 410; Co. Litt. 46, a.
[3] Jenk. Cent. p. 86.
[4] Bro. Seizin, pl. 18; Co. Litt. 42, a.
[5] Co. Litt. 32, a.
[6] Perk. sec. 320.

the seignory, rent, &c., notwithstanding its extinguishment as to other purposes. As in the case put by Perkins: "If the grantee of a rent-charge in fee take a wife, and the grantor leases the land out of which the rent is issuing, to a stranger for life, and the grantee of the rent purchases the reversion of the land, and the tenant for life attorns, and the grantee of the rent dies leaving the tenant for life, his [*i.e.* the grantee's] wife shall be endowed of the rent, but not of the land; because the freehold and inheritance were not joined in her husband *simul et semel* during the coverture."[1] So if the owner of a rent-charge, after marriage, release the rent to the terre-tenant, the widow shall, notwithstanding, be endowed of the rent.[2] In this case the remedy of the widow is against the terre-tenant, and not against the heir of the husband, for the heir has nothing for which the writ can be brought, and though the tenant has not the rent, yet he has the land out of which the rent issues, and the tenant of the land pays it.[3]

In what cases alienation by the husband alone, will defeat dower at common law.

4. Although, as a general rule, the husband can not, by his individual act, defeat the dower interest of the wife after it has once *attached*, yet it sometimes happens, owing to the nature of his estate, that it is exempt for a time from the incident of dower. While in this condition it is in his power to dispose of it at pleasure, and thereby intercept the title of dower. Thus, if the husband have an estate in lands, which, by reason of any precedent or interposed estate of freehold existing in another person, is not subject to an incipient title of dower, an alienation of that estate will prevent the wife from ever becoming dowable thereof, although the particular estate afterwards determine, or is consolidated in the lifetime of the husband.[4] In this case, although the husband is seized during the coverture, the estate is not of such a quality, during his seizin, as a title of dower will attach upon; and it was not until after his alienation that it acquired that quality.[5] In the United States this prin-

[1] Perk. sec. 340.

[2] Lord Abergavenny's case, 6 Co. 79, a.; Lillingston's case, 7 Co. 128, 38, b.; Perk. sec. 322.

[3] Jenk. Cent. 1, Ca. 6; Park, Dow. 239, 240. See, also, Perk. sec. 429.

[4] The same principle applies to estates held in joint tenancy. See ch. 16, §§ 1–5.

[5] Park, Dow. 232; ante, ch. 11, §§ 5, 10; and ch. 15, §§ 1–6.

ciple has been applied to trust estates. As where the husband, as *cestui que trust*, was entitled to a remainder in fee expectant on the life of a third person, and the husband aliened the remainder before the determination of the life estate, it was held that his widow was not entitled to dower.[1]

5. Another instance sometimes occurs in practice in which this principle may be applied. A person having a remainder in fee, subject to a previous estate of freehold in another person, or having the immediate freehold and also the inheritance in remainder upon an interposed estate of freehold, marries and becomes bankrupt, and between the act of bankruptcy and the bargain and sale to the assignees, the particular estate of freehold determines, so that the title of dower attaches. The bargain and sale, when made, having, by force of the bankrupt laws, relation to the act of bankruptcy, takes effect as if made at that time, and consequently overreaches the right of dower; for at the date of the act of bankruptcy the precedent, or interposed estate of freehold, prevented dower from attaching, and the subsequent removal of the impediment will not avail the wife. The assignees, therefore, can make title to a purchaser discharged from her dower.[2]

Instances in which the wife is concluded from avoiding the acts of the husband.

6. There are cases in which, by the rules of the common law, the wife will conclude herself from avoiding charges created by the husband after the title of dower has attached. Thus, as she can have no damages unless the husband *die seized*, if she pray damages upon her recovery in dower, she is regarded as having elected to be endowed of the estate of which the husband was in fact seized at the time of his death; and if, at the time of the charge created, he had a different estate in the land, that charge will be sustained against her; for of that estate the husband did not die seized; and if she had elected to take dower of that estate, she could not have prayed damages. As when A. seized of lands in fee, married, and granted a rent-charge, and afterwards made a feoffment in fee, and took back

[1] Shoemaker *v.* Walker, 2 S. & R. 554; ante, ch. 19, § 26.

[2] Parker *v.* Bleeke, Cro. Car. 568, 569; Benson *v.* Scot, Carth. 275; 1 Salk. 185; 8 Lev. 385; 4 Mod. 251; 12 Mod. 49; Park, Dow. 235. As to the effect of the execution by the husband of a power of appointment, see ch. 14, §§ 9–12.

an estate tail, and died, and the wife recovered dower against the issue in tail by reddition, and making a surmise that her husband died seized, prayed a writ of inquiry to assess damages, which was granted to her; "in this case," remarks Lord Coke, "she holds the land charged with the rent-charge, for by her prayer she accepteth herself dowable of the second estate, for of the first estate whereof she was dowable, her husband died not seized, and so she hath concluded herself; wherefore, if the rent-charge be more to her detriment than the damages beneficial to her, it is good for her in that case to make no such prayer."[1]

7. So, according to the common law, if the widow accept dower of the heir *against common right*,[2] she may be compelled to hold, subject to the charges of the husband,[3] at least as to so much of the land charged whereof she is endowed against common right. As, "if a man be seized of three manors in fee, and take a wife, and grant a rent-charge issuing out of all the three manors, and die; and the wife takes one manor by assignment of the heir, for her dower, in allowance of all the three manors: now two parts of this manor remain charged with the distress of the grantee, although the grant of the rent-charge was made during the marriage; and the reason is, because as to the two parts she has taken her dower against common right; for according to common right she ought to have the third part of every manor."[4] This doctrine, however, as a general rule, appears to extend only to such assignments as are made without suit, for it is added, "but in the same case, if she had *recovered* her dower, and such assignment had been made to her by the sheriff, she should have holden the same discharged.[5] But if a man be seized of three advowsons of three several churches, and take a wife, and grant to a stranger that he shall present to the next avoidance of such one of the three churches as shall first become void, and the grantor dies, and his wife brings a writ of dower against the heir, before any church becomes void, and recovers; and the sheriff assigns to her the advowson of one church for her dower, in allowance of the other churches; which advowson assigned to her is the first which becomes void after the grant made by the husband, and the same avoidance happens after the assignment of the dower, it seems to

[1] Co. Litt. 33, a.

[2] See vol. ii. Index, "Assignment against common right."

[3] Co. Litt. 32, b., and note 2.

[4] Perk. sec. 330. [5] Ibid.; 1 Roper, Husb. and Wife, 393.

some in this case, that the wife shall not have this avoidance, but the grantee shall have the same; because she is endowed against common right; for of common right she ought to have but the third avoidance of each advowson of each church.[1] And although the assignment be made by the sheriff, it shall not prejudice or oust the grantee of his right, because he is a stranger to the assignment; and also he can not otherwise take advantage of his grant, but only at this avoidance; *tamen quære.*[2] But otherwise is it in the case of a grant of a rent-charge out of three manors; for when the assignment is made by the sheriff of one entire manor, in allowance of all the manors, the grantee may distrain for his whole rent in the other two manors, and in every part of them; and it shall not be more prejudicial to the heir this way than the other way."[3]

Collusive recovery against the husband.

8. A recovery by judgment against the husband in a real action, defeats the title of dower of the wife. This proposition must, however, be understood to be confined to recoveries by *actual* title, and not to extend to feigned or common recoveries. The statute of Westminster 2, chap. 4, recites that by the common law, where a husband being impleaded, had given up the land demanded to his adversary, *de plano*, namely, by reddition, the justices, upon a writ of dower brought by the wife, would adjudge her her dower. But that where the land was lost by *default*, there was a difference of opinion; some justices holding that the widow was, and others that she was not entitled to dower. To remove this doubt it was declared by that statute, that in both cases the woman demanding her dower should be heard; and if it were alleged against her that her husband lost the land by judgment, so that she ought not to have any dower, and upon inquiry it was found to be a judgment by default, then that the tenant should further show that he had, and hath right in the

[1] Perk. sec. 331.

[2] Notwithstanding this *quære*, the case cited by Lord Hale, Butl. Co. Litt. 32, b., n. 2, and those in Com. Dig. *Pleader*, 2 Y., 19, Viner's Abr. *Dower*, X., Y., Z., and Bacon's Abr. *Dower*, D. 2, seem to render it clear that the wife would lose the presentation, because she is not compellable to take such assignment from the sheriff; and if she assent to it, *she* shall be bound by her own act, as where the assignment is made by the heir.—*Greening's note, Perk. sec.* 332.

[3] Perk. sec. 332. As to the effect upon the right of dower of alienation by the husband by force of particular customs, see Park, Dower, 244–6.

land according to the writ which he had brought against the husband; and if he proved the husband had no right, nor any one but himself, then that the judgment should be *quod tenens recedat quietus*, and *quod uxor nihil capiet de dote;* but if he could not show that, then that the woman should have judgment *quod recuperet dotem suam.*[1]

9. Perkins remarks that this statute is but a recital of the common law: "For the common law ought to be intended where the husband had right, and he who recovered had no right; and so is the law at this day if the husband lose by default. And so was the common law before the making of that statute; so that that statute is but an affirmance of the common law in this point.[2] And therefore, at the common law, before the making of that statute, if a man seized of land in fee by a rightful title, had taken a wife, and been disseized, and re-entered upon his disseizor, who had arraigned an assize against him, and he had confessed the disseizin, and the disseizor had released the damages, and had had judgment to recover, and had entered, and the husband had died, his wife should, by the common law, have recovered her dower against him who recovered in the assize; because her husband had right, and he who recovered no right.[3] And if a disseizor of land take a wife, and the disseizee releases all his right to the disseizor, and notwithstanding that, brings a writ of entry in the nature of an assize against the disseizor, and recovers by default, and the disseizor dies, his wife may recover her dower against the disseizee, notwithstanding this recovery by default; because at that time her husband had the right by the release, and the disseizee had no right.[4] But if he who recovereth by reddition or by default, had right, then it shall be otherwise. And therefore, if the heir of a disseizor of land be in by descent, and the disseizee enters upon him, and takes a wife, and the heir of the disseizor recovers against the disseizee by reddition, or by default in a writ of entry in the nature of an assize, and the husband dies, in this case, his wife shall not recover her dower by writ; because he that recovered had a right to the possession, according to the nature of his action; and the husband was not seized of any other possession during the coverture, but of that possession which is destroyed and defeated by the recovery.[5] But if a man

[1] Park, Dow. 145; 2 Inst. 347 *et seq.*
[2] Perk. sec. 376.
[3] Perk. sec. 377.
[4] Ibid. sec. 378.
[5] Perk. sec. 379. See 2 Inst. 350.

seized of land in fee, take a wife, and be disseized, and the disseizor dies seized, and his heir is in by descent, upon whom the disseizee enters, and the heir of the disseizor recovers against him by reddition, or by default in a writ of entry in the nature of an assize, and the husband dies, his wife shall recover her dower, although he who recovered had a right to the possession, according to the nature of his action. And the reason is because the husband had an elder (or previous) seizin during the coverture, before the writ brought in which the recovery was; by force of which seizin the wife had title to have dower; and the elder seizin is not defeated and destroyed by the recovery."[1]

10. It will be seen from the last two of these cases, that under the complicated modifications of seizin contemplated by the old black-letter law, it sometimes happened that the seizin of the husband which he had during the coverture would be defeated, and so the wife's title of dower avoided, though the right remained in him; and at other times, that the dower would be preserved, although the seizin was defeated in like manner, by reason that some distinct seizin had attached in the husband at a previous time during the coverture, and which the nature of the action by which his subsequent seizin was defeated, did not reach. It is to be observed, that in the case put by Perkins in section 379, the husband is disseized before marriage, and in the following section not till after marriage. Now, as the right of entry upon the disseizor was taken away by the descent cast, and as a man can not be remitted to his own tortious entry, when the husband enters upon the heir he acquires a wrongful seizin,[2] distinct in the one case from his right, and in the other from his ancient seizin, and therefore defeasible by re-entry, or recovery in a possessory action. In the former case, the strict rule of the common law will not permit the wife to be endowed because the only seizin which the husband had during the coverture is avoided by superior title; and of the right of action she is not dowable.[3] In the latter case, the ancient rightful seizin of the husband being untouched by the recovery in the possessory action, supports her right to be endowed against the recoveror.[4]

11. It appears, also, according to the technical rule of the common law, that although the husband had no right to the lands, yet

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[1] Perk. sec. 380.
[2] See ante, ch. 17, §§ 20, 21.
[3] See ante, ch. 12, § 12.
[4] Park, Dow. 148, 149.

if a degree were past, so that he acquired a *jus possessionis*, and the action brought against him was only a possessory action, or in other respects was not such as the land could be recovered upon, unless by laches of pleading in the husband, the wife may falsify this recovery.[1]

12. The following illustration of this principle is taken from Perkins: "If a disseizor of land die seized thereof, and his heir enters and takes a wife, and the disseizee recovers the land against the husband by default, in a writ of entry *ad terminum qui præteritt*, and the husband dies, his wife shall falsify this recovery in a writ of dower."[2] And the reason is that this writ properly lies only after the determination of a particular estate for life or years, and the lease alleged in the count is traversable.[3] So that the wife may falsify, not only where the recoveror had no right to the land, but where, though he had right to it, he could not lawfully recover by the particular action in which he obtained judgment. And generally, for false pleading in the husband, where he might have pleaded in bar to the action, and not merely in abatement, the wife may falsify. Thus, according to Perkins: "If in a writ of entry *en le post* against the husband, he vouch himself to save the tail, and show for his cause that his father gave the land to him in tail, and that the reversion is descended to him from his father, and the demandant traverses the gift which is found with him, by reason whereof he recovers, and the husband dies, now, if the husband had a release of all actions, or of all the right of the demandant to plead, and did not plead it, his wife shall falsify this recovery in a writ of dower.[4] And if tenant in tail of land hath issue, and dies, and a stranger abates and dies seized, and his heir is in by descent, who takes a wife, and the issue in tail brings an assize of *mort d'ancestor* against the husband, who traverses the points of the writ which are found with the demandant, by force of which he recovers and enters, and the husband dies; in this case it hath been said that the wife shall not recover dower of this land, before this verdict be attainted by the heir in a writ of attaint. Yet it seems she shall falsify this recovery in a writ of dower immediately after the death of her husband; inasmuch as he might have pleaded to the action of the writ

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[1] Park, Dow. 149.
[2] Perk. sec. 384.
[3] Fitzh. N. B. 201, 202; Greening's note, Perk. sec. 384.
[4] Perk. sec. 382.

of the demandant, and she can not have an attaint. And if she shall stay until the heir hath defeated the verdict by attaint, then, perhaps, the heir will release, or perhaps will not sue an attaint; and so the wife in despite of her, shall lose her dower; which is not reasonable, when she was once entitled to have dower by the possession of her husband during the coverture, which possession has never been avoided, except by the laches of the pleading of her husband, because he might have pleaded to the action of the writ of the demandant. *Tamen quære:*[1] because the judgment is given upon the verdict; within which verdict is found matter contrary and repugnant to the matter which ought to be pleaded to the action of the writ; but if the *entry* of the demandant had been lawful, then the law is clear, and without question, that the wife shall not falsify; for then the demandant has been remitted by his entry."[2]

13. But Perkins adds the following upon this point: "And it is to be known, that the demandant in a writ of dower shall not falsify a recovery against her husband by default, for laches of her husband in not pleading a plea which goes merely in abatement of the writ, except in special cases. And therefore, to say that her husband might have pleaded misnomer, &c., or joint tenancy, &c., are not causes to falsify a recovery.[3] But if she shew matter proving that the demandant had not right, or cause of action, except jointly with a stranger, who, by his deed of release which she shews forth, released all his right to her husband, (then tenant of the land,)

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[1] This section may be considered to require some explanation. By the descent to the heir of the abator, the *entry* of the issue in tail was tolled, and he was put to his action by formedon in the descender; for he could not sue a writ of *mort d'ancestor*, that being applicable only to the case of an heir in fee simple; so that the tenant might have pleaded in bar to this writ and avoided it. But the finding upon the traverse in the case put must have been, that upon the day of his death the father of the issue in tail was seized in fee; and Perkins seems to have thought that this finding estopped the widow from alleging the truth. The precise point of the *quære* could not be answered without a more intimate acquaintance with the *minutiæ* of the forms of proceedings in real actions, than is possessed by modern lawyers generally. Now that all lands are devisable, a *mort d'ancestor* can not be brought, and as it is, therefore, impossible for the point to arise, it has not been thought worth while to make an unprofitable search for the solution.—*Greening's note, Perk. sec.* 888.

These sections from Perkins, although containing much antiquated law, are reproduced here, as strongly illustrative of the principle, fully recognized in American courts, that in respect to her right of dower, the wife shall not be prejudiced by the laches, default, or collusion of the husband. See post, § 15; 4 Kent, 48.

[2] Perk. sec. 888.

[3] Ibid. sec. 885.

before the action brought by the demandant, this is good matter to falsify the recovery for one moiety of the land recovered. So shall it be of all such like cases."[1] "And if in a *precipe* brought against the husband, he plead *misnomer*, which is found against him, by force of which the demandant recovers, such recovery shall not oust the wife of her dower, except the demandant had right. And if, in a *precipe* against the husband, he pleads joint tenancy, which is found against him, by which the demandant recovers, this recovery shall not oust the wife of her dower unless the demandant had right."[2]

14. It appears from the last passage, that the wife may falsify recoveries by actions tried, as well as recoveries by reddition and default. This, however, must be understood with the qualification that the falsification is in another point than that which was tried. Thus, where the husband pleads dilatory pleas, as in the cases put by Perkins, the wife may falsify, for this recovery does not disaffirm the possession of the husband.[3] It is proper to remark that in all such cases of falsification of recoveries suffered by husbands, by their widows, the widow shall falsify the recovery as to her title of dower only, and no longer or further.[4]

15. The statute of Westminster 2d, chapter 4, was adopted in Virginia in 1785;[5] in New York in 1787;[6] in Kentucky in 1796;[7] and in New Jersey in 1799,[8] and is still in force in those States. It has also been substantially re-enacted in Ohio,[9] Georgia,[10] Arkansas,[11] Missouri,[12] and Kansas.[13] And it may be added in general terms, that the rule of the common law, protecting the wife from the effects of collusive recoveries against the husband, and from the consequences

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[1] Perk. sec. 386. [2] Ibid. sec. 381.

[3] See Bro. Dow. pl. 24, 26; Bro. Restore, &c. pl. 1.

[4] Shep. Touch. 49; Park, Dow. 152.

[5] 12 Hen. Stat. at Large, p. 163, § 3; 1 Rev. Code, 1819, ch. 107, § 5; Code 1849, p. 476, § 13.

[6] Act of Jan. 26, 1787, 1 Laws N. Y. (1818,) p. 56, ch. 4, § 4; 1 N. Y. Rev. Stat. 742, § 16; 3 N. Y. Rev. Stat. (5th ed.) p. 33, § 16.

[7] 1 Litt. 516; 1 Stat. Ky. (1822,) p. 444, § 3; Rev. Stat. Ky. (1852,) p. 394, § 11; Stanton's Rev. vol. ii. p. 27, § 11.

[8] Laws of N. J. by Paterson, p. 343, § 5; Nixon's Dig. p. 209, § 5.

[9] 2 Chase's Stat. 1815, § 7; 1 Swan & Critchf. 520, § 7.

[10] Hotchkiss' Stat. Law of Ga. (1845,) p. 431, ¶ 13.

[11] Rev. Stat. Ark. (1838,) p. 338, § 16; Dig. Stat. Ark. (1858,) p. 458, § 16.

[12] Rev. Stat. Misso. (1845,) p. 431, § 8.

[13] Comp. Laws Kansas, (1862,) p. 478, § 8.

of his laches in defending against unfounded or improper actions, of which such full exposition is made by Perkins, is generally recognized and enforced in the courts of this country.[1]

English statutory modifications of the common law.

16. The 3 & 4 William IV. chapter 105,[2] already frequently referred to in these pages, has introduced most sweeping changes in the common law, as respects the power of the husband during the coverture, over the wife's contingent right of dower. By that act it is provided that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will:[3] That all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower:[4] That a widow shall not be entitled to dower out of any land of her husband when, in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land:[5] That a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when, by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land:[6] Also, that the right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid.[7] It will be seen, therefore, that by the terms of this enactment, the dower estate of the wife is completely and entirely within the power, and subject to the control of the husband. The only limitation upon this power is contained in the 11th section, which declares that nothing in the act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by, or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them. The act has no application where the marriage

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[1] See 4 Kent, 48; 1 Hilliard's Real Prop. 2d ed. 147, § 40.
[2] Stat. at Large, vol. lxxiii. p. 999. See Appendix.
[3] Sec. 4. [4] Sec. 5. [5] Sec. 6.
[6] Sec. 7. [7] Sec. 8.

occurred on or before January 1st, 1834.[1] As to such marriages the common law is still in force.

17. Under this statute, a conveyance to the husband made prior to its date, will not bar dower, although the conveyance contain words intended to exclude that interest, and the marriage was contracted after January 1st, 1834. Thus, in Fry *v.* Noble,[2] by deed dated in 1827, land was conveyed to one Fry, a married man, to uses to bar dower, concluding with the words "to the intent that the present or any future wife of the said T. W. Fry may not be entitled to dower out of said hereditaments." Mrs. Fry died in 1833. In 1838 Mr. Fry married again, and died in 1842, intestate, leaving his second wife surviving. It was held that she was entitled to dower. "But for these words," said Lord Justice Knight Bruce, "it is admitted that the plaintiff would have a right to the dower which she claims. Have they any operative effect against her? They were, when used, merely superfluous, operating nothing; and they were used under a state of the law which had ceased to exist before the plaintiff's marriage, and with reference to that state. They were not used with reference to the law as it has stood since the Dower Act, and can not, I conceive, be made to apply to rights under the new law introduced by it. A power given in 1833, can hardly have been executed by something written in 1827."[3]

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[1] Sec. 14. "The effect of the act is evidently to deprive the wife of her dower except as against her husband's heir at law. If the husband should die intestate, and possessed of any lands, the wife's dower out of such lands is still left her for her support—unless, indeed, the husband should have executed a declaration to the contrary. A declaration of this kind has, unfortunately, found its way as a sort of common form, into many purchase deeds. Its insertion seems to have arisen from a remembrance of the troublesome nature of dower under the old law, united, possibly, with some misapprehension of the effect of the new enactment. But surely, if the estate be allowed to descend, the claim of the wife is at least equal to that of the heir, supposing him a descendant of the husband; and far superior, if the heir be a lineal ancestor, or a remote relation. The proper method seems, therefore, to be to omit any such declarations against dower, and so to leave to the widow a prospect of sharing in the lands, in case her lord shall not think proper to dispose of them." Williams, Real Prop. 194.

[2] Fry *v.* Noble, 24 Law Jour. Rep. (N. S.) Chanc. 591; 85 Eng. Law & Eq. 240; 7 De Gex, Macnaghten & Gordon's Rep. 687.

[3] 7 De Gex, Macnaghten & Gordon's Rep. 687; Lord Justice Turner *dubitanter*.

Statutory modifications in the United States.

18. In several of the American States, also, there have been serious innovations upon the rule of the common law giving dower in all lands of which the husband was seized at any time during the coverture. It is proposed, in this connection, to note the modifications thus introduced.

19. *Connecticut.*—The statute of Connecticut confers upon the widow dower "in one-third part of the real estate of which her husband died *possessed.*"[1] The word "possessed" is here used as synonymous with "seized."[2] As construed by the courts, this statute gives the husband almost unlimited power in the disposition of his estate. Thus, in Stewart *v.* Stewart,[3] the husband, during the coverture, executed a deed conveying all his real estate to his children, and placed it in the hands of a third person to be delivered to them at his death. On the happening of the event, the deed was delivered in accordance with his directions, and it was held that the instrument was strictly a deed, taking effect from the time of its delivery to the depositary,[4] and that the widow was thereby barred of her dower. In respect to the objection urged on behalf of the widow, that the deed was fraudulent as against her, Hosmer, Chief Justice, said: "Was the deed fraudulent as relative to Mrs. Stewart? This depends entirely on *the right* which she had to the estate conveyed, *anterior* to the death of her husband. If she had *no right* which the law recognizes, then the delivery of the deed could be no fraud on her right, that is, no fraud on a nonentity. By the English law, the right to dower originates on the marriage; but by our law it takes its origin at the husband's death. Our ancestors did not think it expedient to restrain that free transfer of real estate which the interest of the community requires; and for this reason, the law has given to the wife no lien upon, or right, legal or equitable, to the husband's estate, during his life. Her condition, in this respect, is like that of her husband's children, or other heirs; and the only right of either is, to such estate as he has not disposed of."

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[1] Stat. Conn. (1821,) 180, tit. Dower; Stat. 1838, p. 188; 1 Swift's Dig. 85; Conn. Comp. Stat. 1854, p. 382, § 17. See ante, ch. 2, § 8.

[2] Per Hosmer, Ch. J., in Stewart *v.* Stewart, 5 Conn. 320. See, also, Stedman *v.* Fortune, Ibid. 462.

[3] Stewart *v.* Stewart, 5 Conn. 317.

[4] Accord. Tate *v.* Tate, 1 Dev. & Bat. (N. C.) Eq. 22.

20. But the husband can not deprive his wife of her dower by disposing of his estate by will. Upon this point, the court, in the case just cited, made these observations: "Undoubtedly, in the case of a *devise*, the wife will be entitled to her dower; but this is not on the ground of any right prior to her husband's death, but because the estate is considered as cast upon her before the devise commences its operation."[1] Her interest is also regarded as paramount to the claims of creditors.[2]

21. *Vermont.*—The Vermont statute is similar to that of Connecticut, and restricts dower to lands whereof the husband died seized.[3] It is not, however, as strictly construed against the widow in the former as in the latter State. In Thayer *v.* Thayer,[4] a husband, shortly before his death, conveyed all his property, both real and personal, to his children, without any valuable consideration, and with intent to defeat his wife of her dower, at the same time securing to himself the possession, use, and control of it during his life. The conveyance was held fraudulent as against the claim of the wife, and she recovered her dower in the lands. The court were pressed with the decision in Stewart *v.* Stewart, but refused to recognize its authority. "We can not," they said, "yield our assent to the authority of that case. The notion that the right of the wife to dower in the husband's lifetime, is a *nonentity*, and not susceptible of fraud being predicated of it, is unsatisfactory, and, we think, unsound, and at war with the principles of justice. Though the right may be inchoate, it should be protected against the *mala fide* acts of the husband." The case of Ladd *v.* Ladd[5] bore a strong resemblance, in its leading circumstances, to Stewart *v.* Stewart. A person seized of lands, for the consideration of one dollar, and for love and affection, executed a deed conveying the lands to his brother, and afterwards delivered the deed to a third person to be by him kept until the grantor's death, and then to be delivered to the grantee. The grantor retained possession of the lands during his life, and after his death, the deed was delivered to the grantee. The court held the widow dowable of the lands, placing their decision mainly

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[1] Stewart *v.* Stewart, 5 Conn. 317; 4 Kent, 41, note.

[2] Calder *v.* Bull, 2 Root, 50. See, also, Crocker *v.* Fox, 1 Root, 323.

[3] Stat. Verm. 1799; Verm. Rev. Stat. 289; Comp. Stat. 1850, ch. 54, § 1. See ante, ch. 2, § 22.

[4] Thayer *v.* Thayer, 14 Verm. 107.

[5] Ladd *v.* Ladd, 14 Verm. 185.

upon the ground that the estate did not pass by the deed for want of a legal delivery, until her right had attached. In Jenny *v.* Jenny,[1] the doctrine of Thayer *v.* Thayer was reaffirmed, and it was there held that a person can not hold, discharged of dower, lands which he receives as a mere gratuity, or as heir, if they are conveyed to him for the purpose of defeating the dower of the wife of the grantor. In a court of chancery the grantee will be required to account for the property so received, and the interest of the widow therein will be protected. In Vermont, as in Connecticut, the husband is powerless to deprive his wife of her dower estate by will.[2]

22. In Gorham *v.* Daniels,[3] land was conveyed by the husband alone, reserving, however, an estate for the lives of himself and his wife. It was held that upon the decease of the husband, the estate descended to his heirs, subject to the dower of his widow. "Some question might be made," says Redfield, J., in a note appended to the case, "whether the estate of the husband here was such whereof the wife is entitled to dower. But it seemed to us no reasonable doubt could be entertained on that point. The statute of this State is very extensive, endowing the wife of all 'real estate of which her husband died seized in his own right,' the latter clause being intended to exclude trust estates, doubtless. Now it could not, with any degree of fairness, be argued that this was not an estate of which the husband died seized in his own right, although intended for the benefit of another. That must include all estates which descend to heirs. And although this reservation was doubtless intended for the benefit of the wife, yet in law it was the estate of the husband in his own right, and descendible to the heirs as much as if its duration had been measured by the life of any other person."

23. *North Carolina.*—Under the act of 1715, and until the passage of the act of 1784, widows were entitled to dower, as at common law, in all lands of which their husbands were seized at any time during the coverture.[4] But the last-named act limited the right of dower to the lands of which the husband died seized or possessed, or which he had fraudulently conveyed to his children, or

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[1] Jenny *v.* Jenny, 24 Verm. 324.

[2] See statutes cited ante, § 21, note 3; 4 Kent, 41, note.

[3] Gorham *v.* Daniels, 23 Verm. 600.

[4] Taylor *v.* Parsley, 3 Hawks, 125; McIver *v.* Cherry, 8 Humph. (Tenn.) 713. See ante, ch. 2, § 15.

otherwise, with intent to defeat the widow of her dower.[1] This provision is still in force in North Carolina.[2]

24. As a general rule, if the seizin of the husband continue to the time of his death the right to dower is complete.[3] But where the husband, by deed of trust, conveyed his real estate to trustees to satisfy creditors, the widow was held not dowable, although he continued in possession to the time of his decease.[4] And a trust deed by the husband, not proved and registered until after his death, operates by relation to the time of its execution, and defeats dower. The act of 1829, chap. 20,[5] which declares that deeds in trust shall not operate against creditors and purchasers but from their registration, does not apply to the widow's claim of dower, she being, with respect to such claim, neither a creditor nor a purchaser.[6] But such a deed, executed to secure a usurious debt, is void as against the claim of dower, and the widow is not bound to await the action of the heirs before proceeding to enforce her right.[7] In one case it was said by the court, although the point was not decided, that an *agreement* to sell land, in equity, bars the wife's dower.[8]

25. Where a conveyance by the husband to his heirs was not to operate until after his death, and in the mean time he was to have the enjoyment of the land, it was held that as to the wife the conveyance was to be deemed colorable and void. And in such a case, this presumption can only be repelled by the husband's having made an effectual provision for his wife. If, in executing the conveyance to his heirs, the husband declare the object to be to defeat his wife's dower, this makes a case of actual fraud; and the circumstance of his afterwards attempting to make a will in her favor for a part of his land, is not admissible on the question of fraud between the widow and the heirs; because, being incomplete, it is only the sub-

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[1] 1 Public Acts N. C. (1804,) p. 358, § 8.

[2] 1 Laws N. C. (1821,) p. 469, § 8; 1 Rev. Stat. N. C. (1837,) p. 612, § 1; Rev. Code N. C. p. 601, § 1; Winstead *v.* Winstead, 1 Hayw. 243; Hodges *v.* McCabe, 3 Hawks, 78; Frost *v.* Etheridge, 1 Dev. 30; Taylor *v.* Parsley, 3 Hawks, 125; Littleton *v.* Littleton, 1 Dev. & Bat. 327; Norwood *v.* Marrow, 4 Dev. & Bat Eq. 442; Davidson *v.* Frew, 3 Dev. 3; McGee *v.* McGee, 4 Ired. Law, 105.

[3] Arrington *v.* Arrington, 2 Car. Law Rep. 253, (N. C. Rep. 232.)

[4] Taylor *v.* Parsley, 3 Hawks, 125.

[5] 1 Rev. Stat. ch. 37, § 24.

[6] Norwood *v.* Marrow, 4 Dev. & Bat. Eq. 442.

[7] Ibid.

[8] Frost *v.* Etheridge, 1 Dev. 30. See post, § 33.

sequent declaration of one who had committed a fraud, of his not intending to do so.[1]

26. The statute makes dower paramount to the claims of general creditors.[2] But for a considerable time the doctrine prevailed in North Carolina, that a levy upon lands in the lifetime of the husband divested the right of dower, although the lands were not sold until after his death. This was first held in Winstead *v.* Winstead,[3] upon the principle that by relation, the sale, when made, took effect from the date of the levy. This ruling was followed in Hodges *v.* McCabe,[4] where, after dower had been assigned to the widow, the lands were sold by the sheriff under a levy made in the husband's lifetime, and it was held that the right of dower was defeated. But in Frost *v.* Etheridge,[5] these cases were overruled, and a contrary doctrine established. If, however, the *sale*, as well as the levy, be made before the husband's death, the right of the wife is thereby divested, even though the purchaser do not take his deed until after the assignment of dower.[6]

27. *Tennessee.*—The North Carolina acts of 1715 and 1784 were continued in force in Tennessee after the organization of the latter under a separate government.[7] The present statute, like that of 1784, gives dower in the lands of which the husband died seized and possessed. It also declares that any conveyances made fraudulently to children, or others, with intent to defeat the wife of her dower, shall be void.[8]

28. In Combs *v.* Young,[9] Chief Justice Catron condemns severely the act of 1784 for destroying the stability of the common law right of dower, and leaving the wife's support as a widow, entirely at the mercy of the husband. "The legislature," he says, "sweeps from the wife her previous rights, and puts her in the power of the hus-

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[1] McGee *v.* McGee, 4 Ired. Law, 105. See, also, Littleton *v.* Littleton, 1 Dev. & Bat. 327.

[2] 1 Rev. Stat. N. C. p. 615, § 8.

[3] Winstead *v.* Winstead, 1 Hayw. 243, (1795.)

[4] Hodges *v.* McCabe, 3 Hawks, 78, Taylor, Ch. J., dissenting, (1824.)

[5] Frost *v.* Etheridge, 1 Dev. 80, Hall, J., dissenting.

[6] Davidson *v.* Frew, 3 Dev. 3.

[7] Laws Tenn. (1821,) vol. i. pp. 17, 18, § 6; pp. 25, 28, § 13; pp. 292, 295, § 8; p. 296, §§ 9, 10; Laws Tenn. (1831,) vol. i. p. 77, §§ 8, 9; p. 227, § 13; Stat. Laws Tenn. by Car. & Nich. p. 262, § 8; p. 463, §§ 9, 10; p. 497. See ante, ch. 2, § 16.

[8] Code of Tenn. (1858,) §§ 2398, 2406.

[9] Combs *v.* Young, 4 Yerg. 218.

band to an extent abhorred by the common law, and yet more by the civil law, by enacting that the widow shall be entitled to dower of one-third part of all the lands and hereditaments of which her husband died seized or possessed; not of the lands of which he was seized at any time during the coverture; thus preferring the purchaser from the husband. Few provisions in our statute book have been fraught with worse consequences than the repeal of the principle of the common law founded on the wisdom of ages; so ancient that neither Coke nor Blackstone can trace it to its origin; wide spread as the Christian religion, and entering into the contract of marriage among all Christians; the husband on the most solemn occasion of his life, contracting that of all his worldly goods he endows his wife." But in Reid *v.* Campbell,[1] the court were of opinion that the widow's provision was improved by the act of 1784. "Previous thereto," they observed, "she had no fixed right to a portion of the husband's personal estate; and of consequence, she never could receive it unless he should die intestate, or give it to her by will. As the statute says, in the then unimproved state of the country, the dower in land was a very inadequate provision, and to prevent her being thrown on it entirely for her support, it provides that she shall have a portion of the personalty, of which her husband can no more deprive her, than he can of her dower in land, provided she take the steps for the protection of her rights required by law. This was a great and important change in favor of the widow, and well justified the restrictions imposed upon her by the statute. There is no hardship resulting from the change of the common law, and the endowing her only of the lands of which her husband dies seized, because she is protected against gifts in fraud of her dower; and if her husband wills his real estate, it is converted into personalty, of which she is entitled to her distributive share under the statute."

29. It was at one time held that a conveyance by way of mortgage operated to divest dower under the act of 1784. The husband, it was said, did not die seized of land which he had thus conveyed.[2] But now by statute, dower is given in lands mortgaged, or conveyed in trust to pay debts, when the husband dies before foreclosure.[3]

30. If the husband convey lands in his lifetime, the dower of his

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[1] Reid *v.* Campbell, 1 Meigs, 378.

[2] McIver *v.* Cherry, 8 Humph. 713. See, also, Greer *v.* Chester, 7 Humph. 77.

[3] Code Tenn. (1858,) p. 473, § 2399. See ante, ch. 22, § 18.

wife therein is defeated, even though the deed be not registered until after his death.[1] But a *parol* sale, though followed by delivery of possession, does not exclude dower. According to the decisions of the Tennessee courts, such a sale is utterly void, and passes no right nor title to the vendee.[2] And it is settled, also, that the claims of creditors are subordinate to the right of dower.[3] So, also, the wife has dower in lands levied on before the death of the husband, but not sold during his lifetime, as neither the lien of a judgment nor the levy of an execution operates to divest the title or seizin of the husband in the sense contemplated by the statute.[4]

31. The statute, as we have seen, protects the dower interest of the wife against conveyances fraudulently made for the purpose of cutting off her right.[5] And it is held that the statute applies in a case where the husband makes a voluntary conveyance to his son, even though the ostensible object of the conveyance be to defeat creditors.[6] So if the purchase be by a stranger, and the full consideration paid, if the purchaser know that the intention of the vendor in making the sale is to defeat the dower of his wife, the deed, as to her, will be void, and she may have her dower in the lands.[7] But a conveyance of real estate to children is not *per se* fraudulent as to the wife, because no valuable consideration was paid. In order to bring it within the statute there must be an actual intent to defraud her in making the conveyance. The terms of the statute do not apply to a *bona fide* advancement of real estate to a child, properly made according to the wants of the child, and the condition of the father's family and property. Thus, where the husband had, prior to his second marriage, settled upon the younger children of a former marriage certain lands, by parol, as a reasonable advancement, and shortly after his second marriage conveyed the lands accordingly, and the widow of the second marriage claimed dower in the lands, upon the ground that the conveyances were with-

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[1] Chester *v.* Greer, 5 Humph. 26: ante, § 24.

[2] Williams *v.* Dawson, 3 Sneed, 316.

[3] Combs *v.* Young, 4 Yerg. 218; Williams *v.* Dawson, 3 Sneed, 316. See, also, Reid *v.* Campbell, 1 Meigs, 388.

[4] Rutherford *v.* Read, 6 Humph. 423; Overton *v.* Perkins, 10 Yerg. 328. See ante, § 26.

[5] Ante, § 27.

[6] Hughes *v.* Shaw, Mart. & Yerg. 323; London *v.* London, 1 Humph. 1.

[7] Brewer *v.* Connell, 11 Humph. 500.

out valuable consideration, and fraudulent as to her, the court disallowed her claim, and held the transaction valid.[1]

32. *Georgia.*—The act of April 24th, 1760, made it necessary that the wife should join her husband in a conveyance of his lands in order to divest her dower.[2] But by an act passed in 1826 it is provided that all conveyances of lands and tenements made after the passage thereof, by the husband alone, during the coverture, shall be legal and valid, and effectually convey the entire premises therein described, except such lands as the husband became possessed of by his intermarriage.[3] The same enactment secures dower in all lands of which the husband died seized and possessed. By an amendment adopted December 28th, 1842, "all conveyances of real estate made by any sheriff, or other officer, in pursuance of sale made under execution, other legal process, or order of court in the lifetime of the husband, shall be as good and effectual in bar of the right of dower, as if the conveyance were made by the husband himself."[4]

33. Under the foregoing enactments it is held that although a vendor of land merely gives a bond to make title on payment of the purchase money, thus retaining in himself the legal title, yet his widow is not entitled to dower.[5] But an actual sale or conveyance in the lifetime of the husband is necessary to deprive the wife of her right in the land. The mere failure of the husband to sue for land of which he was once legally seized during the coverture, until the statute of limitations attaches as against him, will not affect the wife, nor impair her right when she becomes discovert.[6] So where judgments had been recovered against the husband prior to his marriage, but the lands subject thereto were not sold in his lifetime, it was held that his widow was dowable thereof; that although the judgments created a lien thereon, his seizin was not divested until levy and sale under execution in the manner pointed out by law. Nor did the fact that the estate of the husband was insolvent make any difference as to her rights.[7]

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[1] McIntosh *v.* Ladd, 1 Humph. 459. And see Littleton *v.* Littleton, 1 Dev. & Bat. 327.

[2] 1 Laws of Geo. (1820,) by Prince, p. 109; Schroeder *v.* Chapman, 10 Geo. 323; Hart *v.* McCollum, 28 Geo. 478. See ante, ch. 2, § 17.

[3] Cobb's New Dig. p. 171; Hotchkiss' Stat. p. 429, sub. 4.

[4] Cobb's New Dig. p. 179; Hotchkiss' Stat. p. 429, sub. 5.

[5] Aaron *v.* Bayne, 28 Geo. 107. See ante, § 24.

[6] Hart *v.* McCollum, 28 Geo. 478.

[7] Green *v.* Causey, 10 Geo. 435. See ante, ch. 28, §§ 29–33.

34. *Mississippi.*—The territorial act of December 22d, 1812, gave the widow as her dower "one-third part of all the lands, tenements, and hereditaments of which her husband died seized and possessed, *or had before conveyed,* whereof said widow had not relinquished her right of dower as heretofore provided for by law."[1] This provision was continued in force for a number of years thereafter.[2] But now, by statute, dower is restricted to one-third part of the lands of which the husband died seized and possessed, or which he had before conveyed *otherwise than in good faith, and for a valuable consideration.*[3] It has been held in this State that a sale on execution does not divest the wife's right of dower.[4]

35. *New Hampshire.*—In this State, also, the right of dower is restricted to the real estate of which the husband died seized.[5]

36. *Pennsylvania.*—The distinction between *statutory* dower and dower at *common law,* as existing in Pennsylvania, is pointed out in a previous chapter.[6] It was settled at an early day in that State that a widow is not dowable of lands sold on judicial process to satisfy an existing lien, whether the sale be made during the husband's lifetime or after his death; nor of lands sold under a mortgage executed by the husband during coverture without the concurrence of his wife. In other words, that the right of dower is subordinate to the claims of creditors who acquire specific liens on the estate anterior to the husband's death. This was declared—though not decided—to be the established doctrine, in Graff *v.* Smith,[7] as early as 1789. And in Scott *v.* Crosdale,[8] determined in 1791, where dower was claimed in lands sold by the sheriff under proceedings on a mortgage in the execution of which the wife had not joined, the court, without waiting to hear counsel for the defence, dismissed the application, remarking that "the point had been too long settled to be stirred now." So in the later case of Reed *v.* Morrison,[9] the court—although the case did not call for a direct decision of the point—made these observa-

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[1] Dig. Stat. Missis. Ter. (1816,) p. 254. See ante, ch. 2, § 18.

[2] Rev. Code Missis. (1824,) p. 230, ch. 37, § 1; How. & Hutch. Stat. (1840,) p. 351, § 41; Hutch. Missis. Code, p. 621, § 1.

[3] Rev. Code Missis. (1857,) p. 467, art. 162.

[4] Fleeson *v.* Nicholson, Walker, 247.

[5] New Hamp. Comp. Laws, (1853,) ch. 175, § 3.

[6] Ante, ch. 20, §§ 18–21.

[7] Graff *v.* Smith, 1 Dall. 484.

[8] Scott *v.* Crosdale, 2 Dall. 127.

[9] Reed *v.* Morrison, 12 Serg. & R. 18, 21.

tions: "The widow's right of dower, though much respected, is liable to be defeated by a judicial sale for the payment of debts; and on a mortgage after coverture not executed by the wife, by a sale on judicial process, her dower is defeated." The ruling in Kirk *v.* Dean[1] was to the same effect. But if the sale be not made until after the husband's death, then, as the right of dower has become consummate, although it may be divested from the lands by force of the sale, it will nevertheless attach upon the surplus, if any, and of that she may be endowed.[2]

37. It is to be observed that except as to *statutory* dower,[3] the rule allowing dower to be divested by judicial sales does not appear to have been established by express enactment, but to be the result, rather, of judicial construction.[4] Indeed, in Scott *v.* Crosdale, above referred to, the court were pressed with the argument that in the adjoining State of New Jersey, under a statute similar to that then in force in Pennsylvania, the widow had always been held dowable as against a mortgage executed by the husband alone. The courts, however, have manifested no disposition to extend the rule, and the tendency at this day is rather to restrict its operation. Thus, it has been several times decided that a conveyance or assignment to trustees for the payment of debts, is no impediment to dower,[5] and the rule is the same whether the assignment be voluntary or compulsory.[6] In Helfrich *v.* Obermyer,[7] the court say: "We readily comprehend how a sale on a judgment, a mortgage, or an order of the Orphans' Court, passes the land freed from dower; but the reason is not so obvious why a sale under a testamentary power, created in good faith, for the benefit of creditors, should do so. It is because the law makes a decedent's land a fund for the payment of his debts, by giving the creditors a lien on it, which might be enforced by judicial process, and would extinguish the widow's dower in it. It would come to the same thing in the end, and she is consequently not injured by a process substituted by the husband to

[1] Kirk *v.* Dean, 2 Binn. 347. See 4 Kent, 42; 1 Washb. Real Prop. 207, § 21.

[2] Reed *v.* Morrison, 12 Serg. & R. 18, 21.

[3] Statutory dower is expressly limited to the lands "remaining after payment of all just debts and legal charges." Vide ante, ch. 20, §§ 18, 19.

[4] 1 Hilliard, Real Prop. 2d ed. p. 151, § 16.

[5] Keller *v.* Michael, 2 Yeates, 300; Helfrich *v.* Obermyer, 15 Pa. St. 113. See Kreider *v.* Kreider, 1 Miles, 220; 1 Washb. Real Prop. 207, § 21; 1 Hilliard, Real Prop. 2d ed. 151, § 16.

[6] Eberle *v.* Fisher, 18 Pa. St. 526.

[7] Helfrich *v.* Obermyer, 15 Pa. St. 113.

produce exactly the same result. But a sale without any species of legal constraint, whether immediate or remote, rests on a different foundation, and is attended with different consequences. Dower would be altogether insecure if the husband might bar it by a voluntary sale for payment of a debt, however small, even when incurred to serve for a pretext. For that reason it was ruled in Eberle *v.* Fisher, 1 Harris, 526, that a husband's assignment in insolvency does not divest his wife's dower in the land, inasmuch as it was not, at the time, in the gripe of his creditors. In the present case the husband was free to do with it what he pleased, but always in subordination to the incipient estate of his wife. Had he sold it himself and paid his debts with the price of it, her dower would have remained in it, and his sale can have no other effect when made by the instrumentality of trustees appointed and empowered by him."

38. The case of Eberle *v.* Fisher,[1] to which allusion is made in the foregoing opinion, was a proceeding for dower in lands which had been assigned for the benefit of creditors under compulsion of law: "Our early legislation," the judge delivering the opinion of the court remarks in that case, "as well as many of our early judicial decisions, do no honor to the lords of creation. They bear hard on the weaker sex. Their rights have been held less sacred in Pennsylvania than in many of the States of this Union. For myself I will not be driven a hair's breadth beyond the adjudged cases against the unfortunate woman who has lost her husband. There is no case in our books which carries the extinguishment of a widow's right of dower beyond a judicial sale, and this is not that; this is no more than a voluntary conveyance. The husband had his choice whether to lie in prison on the *ca. sa.*, or surrender his property to his creditors under the then existing insolvent laws. He chose the latter; but there is nothing in these insolvent laws which commanded or authorized him to surrender the incipient rights of his wife. Hence we find that in the case of Shark *v.* Pettit, 1 Yeates, 389, it was ruled that where the lands of the husband whereof he is seized in fee tail during marriage, are sold on judgments obtained against him, and he afterwards suffered a common recovery without making his wife a party, or her executing the deed to lead the uses, and she survives him, she is not barred of dower."[2]

39. In the foregoing cases the court assume as a settled doctrine, that a voluntary alienation by the husband will not defeat the wife's

[1] Eberle *v.* Fisher, 13 Pa. St. (1 Harris,) 526.

[2] Ibid.

right of dower; and they simply extend that doctrine to assignments made for the benefit of creditors, whether voluntary or compulsory. The reasoning in these cases, however, is to be understood as referring to the *common law* right of dower; for, as has been shown, *statutory* dower is confined to lands of which the husband died seized.[1] As to the former, the language of the court is in conformity to the adjudged cases; for it has been decided, upon full consideration of the question, that the widow is not only dowable, under the statute, of the lands of which the husband died seized, subject, of course, to the conditions and qualifications imposed thereby, but also at common law of such lands as he has aliened in his lifetime.[2] Nor does it make any difference whether the husband has aliened by deed, or by contract merely. Dower was allowed in one case where the husband's contract for a conveyance was carried into execution after his death, under a decree of the court.[3] And in another case dower was allowed to the widow of the vendor where the lands had been sold by the personal representatives of the vendee for the payment of the debts of the latter.[4]

40. Nor will a *fraudulent* mortgage of the husband be sustained as against the wife. This was determined in Killinger *v.* Reidenhauer.[5] "In Pennsylvania," said the court in that case, "where lands are considered as chattels for payment of debts, the husband's lands may be levied on and sold, and the wife loses her dower. So here, a mortgage given by the husband will bind the dower right; all the interest may be levied on, and sold on a *levari facias*, without regard to the wife's right of dower; but a mere voluntary mortgage, (much less a fraudulent one, made for the purpose of defeating the inchoate right of the wife,) can not bind her, for this would be in fraud of the law, and in fraud of the right accrued directly on the marriage; initiate on the moment of marriage, consummate on

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[1] See ante, § 87, and ch. 20, §§ 18, 19.

[2] Leinaweaver *v.* Stoever, 1 Watts & Serg. 160; Borland *v.* Nichols, 12 Pa. St. (2 Jones,) 42; Hinnershits *v.* Bernhard, 13 Pa. St. (1 Harris,) 518; Pritts *v.* Ritchey, 29 Pa. St. (5 Casey,) 71. And see Riddesberger *v.* Mentzer, 7 Watts, 141; In re Drenkle's Estate, 8 Barr, 377. In Pritts *v.* Ritchey, above cited, it is said: "Our common law dower exists only in relation to land sold by the husband without his wife's consent; and dower in such case may generally be very unjust; for thus a widow may be endowed of land sold by her husband in his lifetime, and yet share in other estate, real and personal, that may have been obtained by the sale of it."

[3] Riddesberger *v.* Mentzer, 7 Watts, 141; accord. Covert *v.* Hertzog, 4 Barr, 145.

[4] Leinaweaver *v.* Stoever, 1 Watts & Serg. 160.

[5] Killinger *v.* Reidenhauer, 6 Serg. & R. 531, 534.

the death of the husband; a right much respected in law; highly favored, next to liberty and life."

In what States the concurrence of the wife is necessary to divest her dower.

41. In many of the States the rule of the common law withholding from the husband the power, by his individual act, to defeat the right of dower after it has once attached, is retained. This is the case in the following named States: Alabama,[1] Arkansas,[2] Delaware,[3] Florida,[4] Illinois,[5] Indiana,[6] Iowa,[7] Kentucky,[8] Kansas,[9] Massachusetts,[10] Maine,[11] Maryland,[12] Michigan,[13] Missouri,[14] Minne-

[1] Clay's Dig. p. 172, § 3; Code 1852, § 1354; Allen *v.* Allen, 4 Ala. 556.

[2] Rev. Stat. Ark. p. 386, § 1; Dig. Stat. Ark. (1858,) p. 451, § 1; Menifee *v.* Menifee, 3 Eng. 9; Crittenden *v.* Johnson, 6 Eng. 94; Crittenden *v.* Woodruff, Ibid. 82.

[3] Act of 1816; Laws of Del. (1829,) p. 167, § 2; Del. Code (1852,) ch. 87, § 1. The act of 1816 contained a proviso that nothing therein contained should be construed or taken to affect or destroy any lien or incumbrance existing before its passage. In Brinckloe *v.* Brinckloe, decided in 1821, it was held that *debts* contracted prior to the passage of the act had preference, under this proviso, to the widow's right of dower. Laws of Del. (1829,) p. 167, note. But this doctrine was afterwards overruled in Griffin *v.* Reece, 1 Harring. 508, where it was held that a debt contracted before the passage of the act is not a "lien" or "incumbrance," within the meaning of those terms, as there employed. See ante, ch. 2, §§ 11, 12.

[4] Thompson's Dig. p. 184, § 1.

[5] Rev. Stat. Ill. ch. 34, § 1; Stat. Ill. (1858,) vol. i. p. 151, § 1; Sisk *v.* Smith, 1 Gilm. 503; Gold *v.* Ryan, 14 Ill. 53.

[6] 1 Rev. Stat. (1852,) ch. 27, § 35; McMahan *v.* Kimball, 3 Blackf. 1; Rank *v.* Hanna, 6 Ind. 20.

[7] Revision of 1860, § 2477. See ante, ch. 2, § 36.

[8] Rev. Stat. Ky. (1852,) p. 393, § 3; Stanton's Rev. vol. ii. p. 23, § 3.

[9] Comp. Laws Kansas, (1862,) p. 478, § 1.

[10] Rev. Stat. (1836,) ch. 60, § 1. See, also, p. 471, § 53; Gen. Stat. Mass. (1860,) p. 469, § 1; Stinson *v.* Sumner, 9 Mass. 149.

[11] Rev. Stat. (1857,) ch. 103, § 1; Drummond *v.* Drummond, 40 Maine, 85.

[12] 1 Dorsey's Laws, 701, § 10; 1 Maryl. Code, (1860,) p. 325, § 5; p. 327, § 11; Mildred *v.* Neil, 2 Bland, 354; Ewings *v.* Ennolls, Ibid. 356; Bowie *v.* Berry, 3 Md. Ch. Decis. 359; Steuart *v.* Beard, 4 Md. Ch. Decis. 319.

[13] 2 Comp. Laws Mich. (1857,) p. 850; May *v.* Rumney, 1 Mann. 1.

[14] Misso. Rev. Stat. (1845,) ch. 54, § 1. See ante, ch. 2, § 81. Where lands had been sold under execution, in 1827, on a judgment rendered in 1824, it was held, that under the law then in force, the right of dower was defeated, although the husband died after the repeal of the law, and the passage of a statute giving dower in all lands of which the husband was seized during the coverture. Kennerly *v.* Misso. Ins. Co. 11 Misso. 204. See, also, Hornsey *v.* Casey, 21 Misso. 545; Stone *v.* Stone, 18 Misso. 389; Davis *v.* Davis, 5 Misso. 183.

sota,[1] New York,[2] New Jersey,[3] Ohio,[4] Oregon,[5] Rhode Island,[6] South Carolina,[7] Virginia,[8] Wisconsin.[9] And the law is the same in the District of Columbia.[10] The statutes above cited have reference to *legal* estates held by the husband during the coverture. Where he is possessed of an *equitable* estate, only, he may transfer it at any time before his death, discharged from the incumbrance of dower.[11]

The husband may complete contract of sale made prior to the marriage.

42. It is shown in a previous chapter, that where the husband has sold the lands before the date of his marriage, he may convey them after the marriage, in execution of the contract, free from dower.[12]

Husband can not defeat dower in equity of redemption of mortgage executed during the coverture.

43. In the case of Swaine *v.* Perine,[13] the wife had joined with her husband in the execution of a mortgage upon his lands. Subsequently the husband released the equity of redemption, the wife not being a party to the release. It was held that she was not thereby barred of her claim of dower in the equity of redemption. "The plaintiff," said the chancellor, "was no party to that release, and her right of dower in the equity of redemption could not, therefore,

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[1] Rev. Stat. Min. (1858,) p. 407, § 1.

[2] 3 Rev. Stat. N. Y. 5th ed. p. 31, § 1.

[3] Rev. Stat. 1847, ch. 4, § 1; Nixon's Dig. p. 209, § 1; Yeo *v.* Mercereau, 3 Harr. 387; Lloyd *v.* Conover, 1 Dutch. 47.

[4] Rev. Stat. (1854,) ch. 39, § 1; 1 Swan & Critchf. p. 516, § 1.

[5] Stat. Oregon, (1855,) p. 405, § 1.

[6] Rev. Stat. (1857,) ch. 202, § 1; p. 337, § 10.

[7] Stat. S. C. vol. iv. p. 742; 1 Brev. Dig. p. 268, tit. 67; Avant *v.* Robertson, 2 McMullan, 215.

[8] Code of Va. (1849,) p. 474, § 1; Macaulay *v.* Dismal Swamp Land Co., 2 Rob. Va. 507; Higginbotham *v.* Cornwell, 8 Gratt. 83.

[9] Rev. Stat. Wis. (1858,) p. 545, § 1.

[10] Rev. Code Dist. Col. ch. 49, § 1.

[11] See ante, ch. 20, §§ 45–49, where the authorities upon this subject are collected; also, ch. 19, § 25.

[12] Ch. 28, §§ 15–21. See, also, ch. 19, §§ 29–35.

[13] Swaine *v.* Perine, 5 John. Ch. 482, 490.

be affected by it." A like decision, upon a similar state of facts, was made in Kentucky.[1]

Sale of equity of redemption on execution against the husband.

44. Where the husband and wife join in the execution of a mortgage of the husband's lands, and the equity of redemption is afterwards levied on and sold under execution against the husband, the right of the wife to be endowed is not thereby impaired, but may be asserted against the lands in the hands of the purchaser.[2] Otherwise the husband, by creating an indebtedness against himself, might do indirectly that which the law does not permit him to do directly.

Mechanics' lien.

45. It sometimes becomes a question whether the lien of mechanics and material men acquired under the statutes of the different States, for labor performed and materials furnished in erecting buildings on the land of the husband during the coverture, is superior, or subordinate to the right of dower. Although there is some diversity of opinion upon the subject, the weight of authority is with the dowress. In Kentucky,[3] the courts have held adversely to her claim; but in Indiana,[4] Illinois,[5] Massachusetts,[6] and Virginia,[7] the rule is otherwise settled, and the right of dower is held to override the lien of the mechanic and the material man. "Hers is the elder lien," say the court in Bishop *v.* Boyle; "the mechanic bestows his labor with a knowledge of her prior right in the real estate, and he knows the house he is building, as brick is added to brick, and nail after nail is driven, becomes real estate. He can protect himself by security or not venture. She is passive and can do nothing."

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[1] Harrow *v.* Johnson, 3 Met. (Ky.) R. 578. See, also, Simonton *v.* Gray, 34 Maine, 50; Lund *v.* Woods, 11 Met. 566; Van Duyne *v.* Thayre, 19 Wend. 162; 4 Kent, 44; ante, ch. 28, §§ 26–28.

[2] Harrison *v.* Eldridge, 2 Halst. 392; Barker *v.* Parker, 17 Mass. 564; 4 Kent, 45. See, also, Rev. St. Mass. 1836, p. 471, § 53.

[3] Nazareth Inst. *v.* Lowe, 1 B. Mon. 257.

[4] Pifer *v.* Ward, 8 Blackf. 252; Bishop *v.* Boyle, 9 Ind. 169.

[5] Shaeffer *v.* Weed, 3 Gilm. 511; Gove *v.* Cather, 23 Ill. 634.

[6] Van Vronker *v.* Eastman, 7 Met. 157.

[7] Inege *v.* Bossieux, 15 Gratt. 83. See, also, Choteau *v.* Thompson, 2 Ohio St. 114.

Forfeiture by reason of the husband's crime.

46. By the ancient law of England, the wife of a person attainted of treason or felony could not be endowed.[1] This harsh rule was mitigated by the 1 Ed. VI. chapter 12, which enacted: "That albeit, any person or persons of what estate, condition, or degree he or they be, shall hereafter fortune to be attainted, convicted or outlawed of any treason, petit treason, misprision of treason, murder, or felony whatsoever, yet that notwithstanding, every woman that is or shall fortune to be wife of the person so attainted, convicted, or outlawed, shall be endowable and enabled to demand, have, and enjoy her dower in like manner and form, as though her husband had not been attainted, convicted, or outlawed; any statute, law, usage, or custom to the contrary in any wise notwithstanding."[2] But by the 5th and 6th of the same king, chap. 11, the forfeiture of dower was partially revived, it being enacted: "That the wife or wives whose husband or husbands hereafter shall be attainted of *treasons* specified in this act, or of any other treasons, whatsoever they be, shall, in no wise be received to ask, challenge, demand, or have dower of any of the lands, tenements, or hereditaments of any the person or persons to be attainted of treason as is aforesaid, during the time said attainder is in force."[3] The words of this act being general were construed to exclude the wife as well in cases of petit as of high treason.[4] But in the case of certain modern treasons relating to coins, the forfeiture of dower is expressly saved.[5]

47. Upon the ground, probably, that the forfeiture of dower on attainder was by reason of the disinherison of the issue,[6] it is said in Littleton, section 55, to have been the opinion of Vavisor, that if a man seized of land committed felony, and after aliened, and after was attainted, the wife should have a good action of dower against the feoffee, although not if it escheated to the king or to the lord. If this point be law, it might be expected to be applicable to treason at this day, but Lord Coke denies this section to be Littleton's, and adds, that "it is clear in law that the wife at the common law should

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[1] Perk. sec. 308, 387; Fitzh. N. B. 150; Gilb. Uses, 402; Staund. P. C. book 3, ch. 3; Brit. ch. 110.

[2] Sec. 17. [3] Sec. 13.

[4] Co. Litt. 37, a., 392, b.; Staund. Pl. Cor. 195.

[5] Stat. 5 Eliz. ch. 11; 18 Eliz. ch. 1; 8 & 9 W. III. ch. 26; 15 & 16 Geo. II. ch. 28.

[6] See Sav. 54.

not have been endowed against the feoffee. For to deter and retain men from committing of treason or felony, the law hath inflicted five punishments upon him that is attainted of treason or felony." He then enumerates these punishments, and among them the loss of his wife's dower, and adds: "So as the woman shall lose her dower, as well against the feoffee, as against the lord by escheat. And so it was resolved in a writ of dower brought by Mary Gates, late wife of John Gates, who, after the coverture had infeoffed Wiseman in fee, and after committed high treason, and was thereof attainted, that the wife should not be endowed against the feoffee, and in that case it was resolved that so it was at the common law in case of felony."[1]

48. In the report of Gates *v.* Wiseman by Dyer, he comments upon the words of the statute 5 and 6 Ed. VI. ch. 11, "that the wife of any man attainted of any manner of treason whatsoever, *shall, in no wise be received to ask, challenge, demand, or have dower of any of her husband's lands during the force of that attainder.* . . . . And yet note the case above, that the lands aliened before the treason committed, were never subject to any forfeiture or escheat, as in the case of Vavisor, at the end of the chapter of dower in Littleton; and therefore, A. Browne, serjeant, was very angry with the above judgment."[2] This judgment, however, is confirmed by the decision in Maynye's case.[3] Maynye, seized of lands in fee, made a feoffment to a stranger, committed treason, and was attainted thereof, and had a charter of pardon, and died. It was moved by Plowden in the Exchequer, if the wife of Maynye should have dower against the feoffee; and per Manwood, C. B.: "By reason of this attainder, dower can not accrue to the wife, for her title begins by the intermarriage, and ought to continue and be consummated by the death of the husband, which can not be in this case, for the attainder of the husband hath interrupted it, as in the case of elopement, and this attainder is an universal estoppel, and doth not run in privity only betwixt the wife and him to whom the escheat belongs, but every stranger may bar her of her dower by reason thereof, for by the attainder of her husband the wife is disabled to demand dower as well as to demand his inheritance; and he cited the resolution of all the justices of England in the case of the Lady Gates, 4 Ma. Dyer, 140."

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[1] Co. Litt. 41, a.; Gates *v.* Wiseman, Dy. 140, b.; Benloe & Dal. 55, a., S. C.

[2] Gates *v.* Wiseman, Dyer, 140, b.

[3] Maynye's case, 1 Leon. 3.

49. When, however, after the attainder of treason, the husband procures a charter of pardon, his wife will, it seems, be dowable of all lands of inheritance of which he becomes seized after the charter of pardon; "for," as Perkins observes, "although she was his wife at the time of the attainder, yet the issue which the husband might have had by her, after the purchase of his charter of pardon, is inheritable."[1] But notwithstanding the charter of pardon, the wife has been held not dowable of the lands which the husband had before its date; and even, as it seems, though such lands descended to, or were purchased by him in the interval between the attainder and the pardon.[2] In Maynye's case before cited, Chief Baron Manwood observed: "The pardon doth not help the matter, for the same extends but to the life of the offender, but doth not take away the attainder, by which she is barred to demand dower during the said attainder in force."[3] This observation, however, if the cases above cited are to be received as law, appears to be too general in its language.

50. But if the heir succeeded in reversing the attainder by writ of error, the wife was thereby rendered dowable; and though before the treason committed, the baron had levied a fine with proclamations, and five years had passed before the reversal, she might, nevertheless, maintain her right; for during the attainder she could not assert any claim, and she had no means of reversal, and the action and right of dower accrued to her after reversal of the attainder.[4]

51. The English law upon this subject was never adopted in this country to any considerable extent.[5] The Vermont statute of 1779 contained a proviso "that this law doth not extend to the widows of those that have, or may be, guilty of treason."[6] And in Kentucky, prior to the act of 1796, the conviction of a person charged with treason or felony, worked a forfeiture to the commonwealth of all the estate of the offender.[7] But the proviso in the Vermont statute above quoted was omitted in subsequent revisions of the laws of that

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[1] Perk. sec. 387. And see Bro. Escheat, pl. 27, S. P. as to felony before the Stat. 1 Ed. VI. ch. 12.

[2] Bro. Escheat, pl. 27, as to felony before the statute.

[3] Maynye's case, 1 Leon. 3.

[4] See Menvil's case, 13 Co. 19, 416; Moor, 639, S. C.; stated, also, in Bartholomew v. Belfield, 2 Bulstr. 244, 245; Park, Dow. 217–22; 2 Bl. Com. 131.

[5] See Stearns' Real Act. 287, 2d ed.

[6] Passed Feb. Session, 1779; Verm. State Papers, 360; ante, ch. 2, § 22.

[7] Rankins v. Rankins, 6 Mon. 535; Stat. Law Ky. (1831,) vol. i. p. 532, note.

State; and in Kentucky by the statute of December 17th, 1796, it was enacted that conviction of treason or felony should be no cause of forfeiture of dower.[1] During the war of the American Revolution the legislatures of several of the States passed laws confiscating the property within their respective jurisdictions, of such individuals as adhered to the public enemies. But it appears in every instance in which the question was made that the courts held the dower right of the wife to be not impaired by the confiscation or sale of the husband's estate under those acts. This point was decided in South Carolina as early as in 1789,[2] and again in 1796;[3] and in Massachusetts in 1812.[4] It has also been determined in New York,[5] in Pennsylvania,[6] and a ruling made in Connecticut is in harmony with this current of authority.[7] The spirit of these cases is decidedly condemnatory of the stern and inhuman policy of the English laws, which inflicted upon the wife, punishment for the husband's crime. "By the rigor of the ancient feudal system," says Parsons, Chief Justice, in Sewall *v.* Lee,[8] "the wife of an attainted traitor or felon lost her dower; and this severity was admitted to induce the husband to abstain from those crimes, from a consideration that his wife, as well as his heirs, must suffer for his offence. But to this rigor the genius and temper of our laws are abhorrent."

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[1] 1 Litt. 466; Statute Law Ky. (1834,) vol. i. p. 531, § 43.

[2] Mongin *v.* Baker, 1 Bay, 73.

[3] Wells *v.* Martin, 2 Bay, 20. See, also, Collins *v.* Kincaid, Ibid. 536.

[4] Sewall *v.* Lee, 9 Mass. 363.

[5] Palmer *v.* Horton, 1 John. Cas. 27; accord. Hogle *v.* Stewart, 8 John. 81. In New York, after the decision in Palmer *v.* Horton, an act was passed to the following effect: "No widow whose husband was convicted and attainted of adhering to the enemies of this State, in and by the act entitled 'An act for the forfeiture and sale of the estates of persons who have adhered to the enemies of this State, and for declaring the sovereignty of the people of this State, in respect to all property within the same;' and no widow whose husband was convicted in pursuance of the act aforesaid, in the supreme court of judicature, or at any court of oyer and terminer, or general or quarter sessions of the peace, of all or either of the offences in the said act specified, shall be endowed of any lands whereof the husband was seized at the time of such conviction, or at any time before: Provided always, That nothing in this act contained shall be construed to affect the claims of any such widow, whose husband died before the passing of this act." Act of Feb. 20, 1806, 1 Laws of N. Y. (1818,) p. 60, ch. 17.

[6] Cozens *v.* Long, 2 Penn. 764.

[7] Cornwall *v.* Hoyt, 7 Conn. 420.

[8] Sewall *v.* Lee, 9 Mass. 363, 367. See, also, Stearns' Real Act. 287; 1 Washb. Real Prop. 194, 195, § 2.

52. In several of the States the wife is protected by express statute against the consequences of the husband's crime. In New Jersey an act passed in 1796, and still in force, provides that dower shall not be barred by the conviction of the husband of any offence against the State.[1] So in Missouri,[2] Arkansas,[3] and Kansas,[4] it is declared that no crime of the husband shall prejudice the right of dower, nor preclude the wife from the recovery thereof. The New York statute of 1787 contained the following provision: "The wife of every person who shall hereafter be attainted, convicted, or outlawed of any treason, petty treason, misprision of treason, murder or felony whatsoever, shall be endowable and enabled, if she survive her husband, to demand, have, and enjoy her dower, in like manner and form as if her husband had not been convicted or outlawed."[5] Reference has already been made to the Kentucky statute of 1796, to the same effect.[6] By the North Carolina act of 1779, also, dower was saved in confiscated lands.[7]

53. It is expressly declared in the Constitution of the United States, that "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."[8] This provision would seem to inhibit any attempt, at least on the part of Congress, to visit upon the wife, any more than upon the heirs of the offending party, the consequences of his crime. Where, therefore, a forfeiture of the estate of the husband occurs *during the coverture* under an enactment conforming to this constitutional provision, it would seem clear that the right of the wife to be endowed after the husband's death, will not be impaired. The *seizin* of the husband is not thereby divested; he is simply deprived of the right of enjoyment during the term of his natural life; and the estate descends, at his death, to his legal representatives, charged with the incident of dower which had attached previously to the forfeiture. But if a forfeiture were duly established *before* the marriage, a grave question might then arise with respect to the wife's right of

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[1] Act of 1796, § 75; Paterson, p. 221; Laws of New Jersey, (1821,) p. 263; Rev. Stat. 1847, p. 284.

[2] Rev. Statutes Misso. (1845,) p. 431, § 8.

[3] Rev. Stat. 1838, p. 388, § 16; Dig. Ark. Stat. (1858,) p. 453, § 16.

[4] Comp. Laws Kansas, (1862,) p. 478, § 8.

[5] Act of Jan. 26, 1787, § 10; 1 Laws of N. Y. (1813,) p. 59. This is substantially a re-enactment of 1 Edw. VI. ch. 12, § 17. See, also, 1 N. Y. Rev. Stat. 742, § 16.

[6] Ante, § 51.

[7] 1 Laws N. C. p. 391, ch. 153.

[8] Art. 3, sec. 3, sub. 1.

dower. For in such case the husband would be virtually stripped of any present freehold estate in the lands; and the government, or its grantee, would be invested with an estate therein for the term of the husband's life. And as it is an established principle that in order to confer the right of dower, the husband must have a present freehold interest, as well as an estate of inheritance in the lands, it would seem to follow that in such case, no right of dower would attach upon the forfeited estate.[1]

54. In none of the American States does treason or felony work corruption of blood. The constitutions of Pennsylvania, Delaware, and Kentucky declare that there shall be no forfeiture for treason except for the life of the offender; that of Maryland that there ought to be no forfeiture except in cases of treason or murder; in South Carolina that there shall be no forfeiture of lands for treason, of persons who die without having been attainted; and forfeiture for felony is expressly abolished. In Ohio it is declared that no conviction shall work corruption of blood, or forfeiture of estate. In other States forfeiture is believed to be abolished, either expressly or by strong implication.[2]

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[1] See ante, ch. 15.

[2] Rawle's note, Wms. Real Prop. 103.

CHAPTER XXX.

DOWER WHERE THE WIFE HAS JOINED IN A CONVEYANCE FRAUDULENT AS TO CREDITORS.

1. It is a question upon which the cases are not entirely agreed, whether the wife shall have dower where she has joined her husband in a conveyance fraudulent as to creditors, and the creditors have afterwards avoided such conveyance. The weight of authority, however, appears to support the claim to dower in such case.

2. In The Manhattan Company *v.* Evertson,[1] one G. B. Evertson and his wife had joined in a mortgage of certain lands to the complainants in 1824. In 1827 they made absolute conveyances of the same premises to J. R. Evertson, their son; he, at the same time, executing a separate declaration of trust, among other things, to sell the lands, and after paying the incumbrances thereon, to pay one J. Emott $1500. Afterwards the lands became subject to other incumbrances, both by judgment and mortgage, against G. B. Evertson, the grantor in the deeds. Upon proceedings in foreclosure by the Manhattan Company, on their mortgage, there remained, after satisfying the decree, a surplus of about $8000, for distribution. It was insufficient to pay all the liens upon the premises, and G. B. Evertson having deceased, the question arose whether his widow was entitled to be endowed of the surplus. Upon this point the vice-chancellor held as follows: "Mrs. Evertson, the widow of G. B. Evertson, is not entitled to dower in the surplus. I am inclined to the opinion that the deeds of the 12th and 19th February, 1827, from G. B. Evertson and wife to J. R. Evertson, were, as between the parties thereto, valid; that the whole title and interest of the grantors passed to the grantee, subject only to the trusts specified and expressed in the declaration of trust executed by J. R. Evertson, and that no beneficial interest reverted or resulted to

[1] The Manhattan Co. *v.* Evertson, 6 Paige, 457.

G. B. Evertson and wife, or either of them, excepting what was so expressed and specified. But if it is otherwise, and all the beneficial interest of the grantors, after the performance of the specified trusts, resulted or reverted to G. B. Evertson, as contended by counsel, still Mrs. Evertson is not entitled to dower in that trust estate. (4 Kent's Com. 46; Banks *v.* Sutton, 2d ed. 2 P. Wms. 700; Chaplin *v.* Chaplin, 3 Id. 229; 1 Cruise's Dig. 488.) The second exception is therefore allowed. The deeds of the 12th and 19th February, 1827, were executed at a time when G. B. Evertson, the grantor, had become embarrassed in his circumstances, and the grantee was his son, and no consideration appears to have been paid. Under these circumstances, although the trusts specified in writing are fair and honest and ought to be performed, and the deeds are to be deemed valid to that extent, yet in all other respects they are inoperative as against the creditors of G. B. Evertson."

Upon appeal, the decree of the vice-chancellor was affirmed. "Whether the conveyances from G. B. Evertson and wife to J. R. Evertson, were absolutely void as against the creditors of the grantors," said the chancellor, "or operated as a valid transfer of the legal title, subject to a resulting trust in G. B. Evertson for the surplus, after paying the mortgage to the complainants, the vice-chancellor was right in supposing the widow was not entitled to dower in the surplus. In either case as between the grantors and grantee, the *legal* title passed to the latter; and previous to the revised statutes the widow could not be endowed of a mere equity. It is very evident, however, from the facts in the case, that although the legal title passed to J. R. Evertson by the conveyances, they must be considered as *void* as regards the rights of the creditors of G. B. Evertson, except so far as those rights were protected by the declaration of trust."[1]

3. The case of Den *v.* Johnson[2] was an action of ejectment brought by a creditor to recover lands levied on and sold under execution on a judgment in his favor against the husband. The defendant claimed under a conveyance from the husband and wife anterior to the date of the judgment. The creditor introduced the wife of the debtor to prove the deed fraudulent, and she so testified. A question was made as to her competency. Upon this point, Dayton, Judge, said: "On the ground of her personal interest, she was unquestionably

[1] See post, § 9.

[2] Den *v.* Johnson, 3 Harr. 87.

competent. The verdict in that case could not, in any respect, affect her. It would never be given in evidence upon any question touching her rights. It was said on the argument that she was swearing in behalf of her own dower. But how? The verdict could not affect that question either directly or indirectly. The object of her evidence was to show that the deed to Johnson was without consideration, and therefore void as against creditors, not as against the grantors; as to them it was perfectly valid in any event, and her dower was unquestionably gone." Hornblower, Chief Justice: "It is said that Mrs. Warings had a personal interest in defeating the deed, inasmuch as it barred her dower, she having executed and acknowledged it. But this is a mistake. If she proved the deed fraudulent as to creditors, she did not thereby restore her husband's title to the land, nor her own right to dower. As against her husband and herself, the deed would remain, both at law and in equity, a perpetual bar." In this case, it would seem, from the facts elicited, that the wife was entirely cognizant of the fraud at the time she joined her husband in the execution of the deed.

4. But in Massachusetts, Ohio, and Illinois a contrary doctrine is held In Massachusetts, the question was directly presented in the case of Robinson *v.* Bates.[1] In that case the wife joined her husband in a conveyance of land, relinquishing to the grantee her right of dower. A creditor of the husband, afterwards, and during the lifetime of the husband, levied an execution on the land, and recovered it in a real action against the grantee, on the ground that the conveyance was fraudulent and void as against creditors. Upon the death of the husband, proceedings were instituted by his widow for dower, and the question arose whether she was barred by her release in the fraudulent deed. The court decided that she was not barred: "But there is another answer to this objection to the demandant's title," the court observed, "which is entirely satisfactory and conclusive. The tenant, at the time, offered to prove that the conveyance to Jacobs was fraudulent and void as to the creditors of the grantor, and that, on that ground, he had recovered judgment for the possession of the premises, against the assignees of the said Jacobs. Now, we are of opinion that the tenant, having avoided the deed to Jacobs, can not now be allowed to set it up as a bar to the demandant's claim. In Stinson *v.* Sumner, 9 Mass. 143, it was

[1] Robinson *v.* Bates, 3 Met. 40.

decided that where a wife releases her claim of dower, by joining her husband in a conveyance, and the purchaser recovers back the purchase money on account of the grantor's defect of title to the land, the release of the wife thereby becomes inoperative, and does not bar her right of dower after her husband's decease. The principle on which that decision is founded applies conclusively to the present case. The tenant has avoided the deed of the husband, and defeated the estate on which the demandant's release of dower was intended to operate. By law, therefore, and in justice, she was thereby restored to her former rights."

5. At the time of the conveyance in the above case, there was in force in Massachusetts a statute which contained the following provision: "All the lands, tenements, and hereditaments of which an intestate died seized, and also all such estate which he had fraudulently conveyed with intent to defraud his creditors, shall be liable for the payment of his debts, and may be recovered and applied thereto, saving to the widow her dower therein, except in the estate so fraudulently conveyed, to which she had legally relinquished her right of dower."[1] It was insisted that the effect of this statute was such as to entirely defeat the claim of dower. The court, however, thought otherwise: "The execution under which the tenant claims title," they said, "was extended on the premises in the lifetime of the demandant's husband, and is not, therefore, within the letter or meaning of the statute, which is expressly limited to the lands, tenements, and hereditaments of an intestate, and to the proceedings after his death. If the demandant's dower is subject to forfeiture, it must be applied to the equal benefit of all the creditors, and the tenant has gained no priority or title under the execution, in respect to the claim of the demandant. Wildridge *v.* Patterson, 15 Mass. 148. Where a statute in clear terms is limited to a certain class of cases, the limitation is not to be extended by construction, especially if it would thereby subject an estate to forfeiture."

6. In Winship *v.* Lamberton,[2] lands had been conveyed without consideration for the express purpose of defeating the collection of a certain claim to a large amount, for the payment of which the

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[1] Stat. 1805, ch. 90, § 5.

[2] Decided by the Supreme Court of Ohio in 1854, but by some accident not reported. The case, however, is referred to, and the point decided stated in Woodworth *v.* Paige, 5 Ohio State, 70. The facts, as above detailed, are taken from the printed abstract of counsel used in the argument.

grantor was surety, the principal debtor being insolvent. Judgment was afterwards recovered against the grantor, and execution issued and levied upon the lands, and they were subsequently sold and conveyed by the sheriff. The purchasers thereupon instituted proceedings in ejectment against the grantees of the debtor and recovered possession, upon the ground that the deeds under which they held were fraudulent as to creditors. They also filed a bill in chancery to quiet their title, and a decree was rendered in conformity to the prayer of the bill, which, among other things, required the grantees in the fraudulent deeds to release to them all right, title, and interest which they had, or pretended to have, either at law or in equity, to the premises in question. Upon this state of facts it was held that the widow of the grantor was entitled to dower. The decision in this case was afterwards referred to in the following terms:[1] "First. The defendant's title was derived from a sale on a judgment and execution against the husband alone. He was not, therefore, in privity with the wife. He derived no title under the fraudulent deed, but held in direct opposition to it. The case fell, therefore, within the principle, often held, that a release of dower is binding only as against the releasee and his privies, and that a mere stranger can not avail himself of it. Pixley *v.* Bennett, 11 Mass. 298; Robinson *v.* Bates, 3 Met. 40; Randolph *v.* Doss and Wife, 3 How. (Miss.) Rep. 205; Taylor *v.* Fowler, 18 O. R. 567. Secondly. The fraudulent deed had been declared to be void and set aside, on a bill filed by the purchasers upon the execution, under whom the defendant claimed; and we were of the opinion that the defendant could not set up this deed, thus annulled, to defeat the widow's claim to dower. Robinson *v.* Bates, *supra*. It is true that it was contended for the defendant, that inasmuch as the decree required the fraudulent grantees to release to the complainants in the bill, the defendant, who held under those complainants, was in privity with these grantees; but we thought that that provision of the decree was only meant to quiet the title against the deed, which by the same decree was declared to be void, and not for a transfer of an independent, substantial title; and that, therefore, there was no privity." The ruling in Winship *v.* Lamberton was approved in the case from which the foregoing quotation is taken.[2] And in a

[1] In Woodworth *v.* Paige, 5 Ohio St. 70.

[2] Ibid. See, also, Miller *v.* Wilson, 15 Ohio, 108, 117.

similar case in Illinois, where the wife joined in a conveyance which was afterwards set aside as fraudulent at the instance of creditors, and the lands were sold and conveyed under a decree for the benefit of creditors, the wife was held entitled to dower.[1] "This question," the court remarked in that case, "was in principle settled in Blair *v.* Harrison, 11 Ill. 384. In that case the lands of Harrison were sold on execution. Subsequently, and before the time for redemption had expired, Harrison and his wife conveyed the same lands by way of mortgage. The premises were not redeemed, and the purchaser obtained a sheriff's deed. Harrison afterwards died, and his widow claimed dower in the lands. The court decided that her right to dower was not barred by the execution of the mortgage, because the estate mortgaged was extinguished by the failure to redeem from the prior sale, and the mortgage could not operate upon the contingent right of dower alone. . . . . The creditors of Babb avoided the conveyance to Butterworth, and thereby defeated the estate upon which the release of dower was designed to operate. The complainant was restored to her right to dower in the lands, and she has since done no act estopping her from asserting it."

7. And it has been decided that although a husband can not, after his marriage, defeat or obstruct his creditors, by selling or exchanging his property and taking back a conveyance to the use of his wife and family, such a conveyance, as to creditors, being considered fraudulent; yet the case may be otherwise in relation to so much of the property received as goes to compensate the just interests of the wife. If, therefore, the wife relinquish her right to dower in other land, in consideration of such conveyance to her, the value of such dower ought to be saved to her in opposition to the claims of the husband's creditors.[2]

8. The opinion is also expressed in a well considered case that a release of dower in a deed executed by husband and wife without consideration, to defraud the creditors of the husband, will not estop the wife to claim dower against the *grantee*, or any purchaser from him with notice.[3] "In the present case," say the court, "the fraudulent deed has not been set aside, and the defendant Paige claims under it. So we are brought to the direct question, whether a wife

[1] Summers *v.* Babb, 13 Ill. 483. See Stribling *v.* Ross, 16 Ill. 122; 1 Washb. Real Prop. 202, § 16.

[2] Quarles *v.* Lacy, 4 Munf. Rep. 251. See, also, Bullard *v.* Briggs, 7 Pick. 533.

[3] In Woodworth *v.* Paige, 5 Ohio St. 70, per Thurman, Ch. Justice.

who joins in a deed, made *without any consideration*, and to defraud her husband's creditors, is thereby estopped to claim dower against a purchaser for a valuable consideration, from the fraudulent grantee. It would seem obvious that if the deed of the husband and wife was executed for a sufficient consideration, and was invalid only by reason of the intent to defraud creditors, she ought to be barred of her dower as against the grantee and his privies. For, as between her and them, there is no reason why her release, made for a sufficient consideration, should be avoided. But the case is quite different, I apprehend, where there is no consideration to uphold the deed, and it can only be upheld by the application of the doctrine, that, as between the fraudulent grantor and grantee, the title of the latter is good. For why, and in what sense, is the deed fraudulent? And why is it that the title of the grantee, who has paid no consideration, is, nevertheless, good? It is fraudulent, simply because it is an attempt to place the property beyond the reach of the husband's creditors, and the title of the grantee is good, except as against the creditors, simply because no court will aid a party to avoid his executed contract made for a fraudulent purpose. But so far as the wife is concerned, she places nothing beyond the reach of the creditors to which they are entitled. It is the husband's estate alone, and not her dower right, that is liable for his debts, and that estate he can convey without her joining in the deed. Her execution of the deed adds nothing to its efficacy so far as his estate is concerned —it simply releases her dower, which the creditors have no right to touch. How then can she be said to be a fraudulent grantor? Whom does she defraud, either by the deed, or by avoiding it so far as to claim dower? Not the creditors, for they had no right to her dower. Not the grantee, for he paid no consideration for the conveyance. Not a purchaser with notice, from the grantee, for such purchaser is in no better condition than the grantee himself. How then can it properly be said that the deed is her executed fraudulent contract, or conveyance, against which she ought not to be relieved, when its execution does not and can not defraud anybody? And what wisdom or justice is there in visiting women, who know so little of the law, and who are so dependent upon, and so much under the control of their husbands, with the extreme penalty of a forfeiture of their dower, upon the ground that they have attempted to defraud their husbands' creditors, when in fact they have released nothing to which the creditors are entitled, done nothing of which they have a

right to complain? For myself, I confess I can not see; and although these views may not, as I am aware, accord with some adjudicated cases, I nevertheless believe they are sound, and it is probable we should so hold, were Paige a purchaser with notice." The court, however, found that the defendant was a purchaser without notice, and therefore dismissed the bill.

9. Although some of the views expressed in the case from New York[1] are not entirely in harmony with the cases from Massachusetts, Illinois, and Ohio above cited, yet it should be noted that the New York case differs from the others in at least one very essential particular. Although no consideration was paid by the grantee in that case, yet the conveyances were made upon certain trusts duly specified in writing, which were pronounced fair and honest by the vice-chancellor, and to the extent of which the deeds were sustained by both him and the chancellor. As against the grantors, therefore, and—to the extent of those trusts—as against subsequent incumbrancers, also, the grantee was lawfully invested with the legal title for a proper purpose. The only interest, if any, remaining in the husband, was a resulting trust, and as this was a mere equity, and under the then existing laws of New York a wife was not dowable of an equitable estate, it followed that she was not entitled to dower in the surplus arising from the sale of the lands. The difference between a case of this character, and one where the conveyance is for the sole and only purpose of defeating creditors, and is without any consideration whatever, is clearly and distinctly marked.

10. It appears, also, that the wife is not affected by the fraudulent acts of the husband in consummating his contracts of sale, although she unite with him in conveying the lands. Thus, where the vendor of a lot of land secretly intended to sell only a part of the lot, but succeeded in making the vendee understand that he was buying the whole of it, and only a part of the lot was included in the deed of conveyance, for which the vendee paid the vendor the entire consideration intended by him to be given for the whole lot, the court required the vendor to execute to the vendee a conveyance for the whole. The wife of the vendor had united with him in the deed, but not being privy to the fraud attempted to be practiced upon the purchaser, the court refused to compel her to join in the new conveyance.[2]

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[1] Manhattan Co. *v.* Evertson, 6 Paige, 457; ante, § 2.

[2] Wiswall *v.* Hall, 3 Paige, 313.

CHAPTER XXXI.

CONSUMMATION OF THE RIGHT OF DOWER.

§ 1–4. By the death of the husband. | § 5–7. By sentence of divorce.

By the death of the husband.

1. UPON the death of the husband, the incipient or inchoate interest which existed in the wife during the coverture becomes consummated and perfected, and her right to demand and enter upon the enjoyment of that interest commences.[1]

2. It is the *natural*, and not the *civil* death of the husband, that is here referred to. "For if the husband entered in religion, the wife shall not be endowed until he be naturally dead."[2] So in Perkins: "If a man seized of land in fee take a wife, and enter into religion, and be professed, his heir shall inherit presently; yet his wife shall not have dower during the natural life of her husband; for the husband can not be professed in religion during the marriage without the assent and agreement of his wife; and if he be so without her assent, the profession is void."[3] But it is said this question can not now arise, even in England; for when the Roman Catholic religion prevailed in that country, and professed persons were legally established there, it was held that a profession in religion in any *foreign* country did not work a disability in England;[4] and since the Reformation, as there can be no *legal* profession in the latter country, the ancient disability arising therefrom has entirely ceased.[5]

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[1] Litt. sec. 36; Park, Dow. 247.

[2] Co. Litt. 33, b., 132, b.

[3] Perk. sec. 307: accord. Fitzh. N. B. 150, (F.); 9 Vin. Ab. 235, K.; Gilb. Dow. 401; Marsh *v.* Hutchinson, 2 Bos. & P. 232, note a.; Park, Dow. 249; Stearns' Real Act. 285, 2d ed.; 2 Crabb, Real Prop. 130; per Kent, Chancellor, in Platner *v.* Sherwood, 6 John. Ch. 129.

[4] Co. Litt. 132, b.; 2 Roll. Abr. 43, b.

[5] Gilb. Uses, by Sugden, 87, n.; Wright's Ten. 28, n. (Y.); Hargr. Co. Litt. 3, b.; Rex *v.* Lady Portington, 1 Salk. 162; Park, Dow. 249.

3. In some of the old law books, however, it is contended that where the husband is banished by abjuration, or by act of Parliament, this is such a civil death as will entitle the wife to dower. This is laid down as the law by Jenkins.[1] In Cotten *v.* Westcott,[2] it was said by Coke, C. J., that in Wayland's case,[3] the wife brought her writ of dower after Wayland's banishment, and it was held the same did not lie; though she was afterwards held entitled to her jointure. But in the case of the wife of Sir Robert Belknap,[4] Belknap was banished, and his wife had dower. Doddridge, J., observed that in 10 Edward III.[5] the wife of Matravers brought a writ of dower, her husband being in banishment, and it was held maintainable.[6] The nearest approach to this doctrine in the United States, appears to be a statute of New York passed in March, 1799, which provides that where a man is sentenced to imprisonment in the penitentiary for life, for the punishment of crime, he shall be considered as civilly dead to all intents and purposes in law.[7] In the case of Troup *v.* Wood,[8] Chancellor Kent expressed the opinion that this statute was only declaratory of the existing law. His conclusion was based upon the pre-existing statutes of that State, and his understanding of the common law, which, by statute, was made part of the law of New York. In the subsequent case of Platner *v.* Sherwood,[9] however, the chancellor became satisfied that he was mistaken in the view entertained by him in the case first cited, that the act of 1799 was only declaratory of the common law. And in the latter case he decided that although a man might be sentenced to imprisonment for life in punishment for crime, still he would not be held to be civilly

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[1] Jenk. Cent. 1, Ca. 4. See Co. Litt. 133, a.

[2] Cotten *v.* Westcott, 3 Bulstr. 187, 188.

[3] Wayland's case, 18 Edw. I.

[4] Temp. H. IV. See Moore, 851.

[5] See 1 Roll. R. 400.

[6] Park, Dow. 249, note; Stearns' Real Act. 285, 2d ed. See, also, Christian's note, 1 Bl. Com. 133; opinion of Ld. Eldon, in Marsh *v.* Hutchinson, 2 B. & P. 226, 231, and note.

[7] 1 N. R. L. 411, sess. 36, ch. 29, § 17; 2 Rev. St. 701, § 20, 1st ed., passed originally in a separate statute, March 29, 1799, sess. 22, ch. 57. See, also, Rev. Stat. of Mass. 1836, p. 483, § 82. In South Carolina, in the case of Wright *v.* Wright, 2 Desaus. 242, 244, it was held that if the husband be banished, he "is considered as *civiliter mortuus*, and such rights as would have survived to him on the death of his wife, are extinct, and gone with him."

[8] Troup *v.* Wood, 4 John. Ch. 228, 247.

[9] Platner *v.* Sherwood, 6 John. Ch. 118.

dead, unless the crime were committed after the law of 1799 took effect. Notwithstanding the broad and comprehensive language of this statute, it does not appear that mere imprisonment for life was ever held in New York sufficient, in itself, to enable the wife to claim her dower. In Ohio, it has been decided, in the absence of any statutory provision on the subject, that a sentence and imprisonment for life in punishment of crime, does not render the party *civiliter mortuus*, so as to authorize a court of probate to grant administration on his estate.[1] So in Kentucky it was held, under the statute of 1802 of that State, that the wife of one convicted of a felony is not thereupon entitled to dower as in case of his decease.[2]

4. In Maryland, however, by a statute passed in 1809, it is provided that if the husband be guilty of polygamy, "his first wife shall, on his conviction, be forthwith endowed of one-third part of his real estate, which she shall hold as tenant in dower, the assignment of which shall be made as prescribed by law in other cases of dower, and she shall have the like remedy for the recovery thereof; and she shall also, on his conviction, be forthwith entitled to one-third part of his personal estate, in the same manner as if such husband had died intestate, and she had survived him, which third part shall be divided and allotted to her in the same manner as distribution is made of the personal estate of intestates."[3] It will be seen that under this statute no divorce is necessary to perfect the right to immediate endowment. And in Michigan, by a recent enactment, if the husband be sentenced to imprisonment for life, the marriage thereby becomes absolutely dissolved without any decree of divorce or other legal process,[4] and the wife is thereupon entitled to dower in the same manner as if the husband were dead.[5]

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[1] Frazer *v.* Fulcher, 17 Ohio, 260.

[2] Wooldridge *v.* Lucas, 7 B. Mon. 49.

[3] Laws of Maryland, by Maxcy, (ed. 1811,) vol. iii. p. 464, § 7. Still in force. Dorsey's Laws, vol. i. p. 579, § 7; 1 Md. Code, p. 207, § 11.

[4] 2 Comp. Laws Mich. 1857, p. 954, § 5.

[5] Ibid. p. 957, § 24. See post, § 5. A statute similar to the Maryland act above quoted was adopted in Kentucky in 1801, and continued in force until after the revision of 1852. 2 Stat. Ky. (1822,) p. 988, § 6; 2 Stat. Law Ky. (1834,) p. 1269, § 6; Rev. Stat. Ky. (1852,) p. 249, § 10. But this provision appears to be omitted in the revision of 1860 by Stanton.

By sentence of divorce.

5. In several of the American States, a decree of divorce, founded on the misconduct of the husband, is sufficient to entitle the wife to demand her dower in his lifetime. Thus, by a Massachusetts statute passed in 1785, it is provided that when there shall be a divorce for the cause of adultery committed by the husband, the wife shall have dower in his lands in the same manner as if he were dead.[1] This provision is retained in the revision of 1836, and is there so enlarged as to embrace the case of a divorce procured on account of the husband being sentenced to confinement to hard labor.[2] In the case of Davol *v.* Howland,[3] it was claimed that the statute of 1785 applied only to lands owned by the husband at the time of the divorce. But the court held this too narrow a construction, and gave the wife dower in all the lands of which the husband was seized during the coverture. It was not to be supposed, they said, that the legislature intended to place in the hands of a criminal husband a power to coerce a continued cohabitation, by exposing the wife to want, if she would avail herself of the liberty afforded her by the law; as upon the construction claimed, it would be in the power of the husband, after committing the crime which is a legal cause of divorce, to transfer all his real estate, and thus deprive his injured wife of the means of support.[4]

6. By the Maine statute any woman divorced from her husband for his fault, may recover her dower against him, or any tenant of the freehold.[5] In Indiana, by the Revised Statutes of 1843, a divorce granted for misconduct of the husband entitled the wife to dower in his lands in like manner as if he were dead.[6] And in Michigan[7] and Wisconsin,[8] when the marriage is dissolved by the husband being sentenced to imprisonment for life, or when a divorce is decreed for the cause of adultery committed by him, or for his misconduct, or on account of his being sentenced to imprisonment

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[1] Stat. 1785, ch. 69, § 3; Stearns' Real Act. 285; Smith *v.* Smith, 13 Mass. 231.

[2] Mass. Rev. Stat. 1836, p. 483, § 82; Gen. Stat. Mass. (1860,) p. 535, § 38.

[3] Davol *v.* Howland, 14 Mass. 219.

Accord. Harding *v.* Alden, 9 Greenl. 140. See, also, Whitsell *v.* Mills, 6 Ind. 229.

[5] Rev. Stat. Maine, (1840-41,) p. 608, § 10. See Young *v.* Gregory, 46 Maine, 475.

[6] Rev. Stat. 1843, ch. 35, § 57. See Rev. Stat. 1852, p. 237, § 18.

[7] 2 Comp. Laws Mich. (1857,) p. 957, § 24; ante, § 4.

[8] Rev. Stat. Wis. (1858,) p. 626, § 25.

for a term of three years or more, the wife is rendered dowable of his lands in the same manner as if he were dead. So in Minnesota[1] and Oregon,[2] where the marriage is dissolved by the husband being sentenced to imprisonment, and when a divorce is ordered for the cause of adultery committed by the husband, the wife is entitled to her dower in the same manner as if he were dead. But these statutes can not have a retrospective operation, and consequently, as to all lands conveyed by the husband before they were enacted, the claim for dower must be postponed until his actual decease.[3] And it seems that the divorce must be granted by reason of the misconduct of the husband alone. Therefore, where the court, in their decree, found that both parties had been guilty of malconduct toward each other, and declared that the divorce was not granted upon the misconduct of the husband alone, but upon the misconduct of both the parties, the wife was held not entitled to dower under the statute.[4]

7. And upon the principle that the law of the State where the lands are situate is to govern in respect to the right of dower therein, it was held in Maine, that a statute of the character above referred to applied to a case where neither the husband nor the wife was an inhabitant of the State, and where the divorce was decreed by a court of another State in which the wife was a resident, but in which the husband had never resided; and dower was allowed the wife in conformity to the doctrine thus laid down.[5]

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[1] Rev. Stat. Minn. (1859,) p. 466, § 24.

[2] Stat. of Oregon, p. 540, § 10.

In Missouri, in the case of Wood *v.* Simmons, 20 Misso. 363, it was held that "upon a sentence of divorce a wife becomes entitled to all choses in action not previously reduced into possession by the husband, as by survivorship upon the death of the husband."

[3] Given *v.* Marr, 27 Maine, 212; Curtis *v.* Hobart, 41 Maine, 230; McCafferty *v.* McCafferty, 8 Blackf. 218; Comly *v.* Strader, 1 Carter, 184; S. C. 1 Smith, 75.

[4] Cunningham *v.* Cunningham, 2 Carter, (Ind.) R. 283.

[5] Harding *v.* Alden, 9 Greenl. 140; Bishop, Mar. and Div. § 665.

APPENDIX.

3 & 4 WILL. IV. CAP. CV.

AN ACT *for the Amendment of the Law relating to Dower.* [August 29, 1833.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall, in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows: (that is to say,) the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, (except such as are not liable to dower,) and to any share thereof; and every word importing the singular number only, shall extend and be applied to several persons or things, as well as one person or thing.

II. And be it further enacted, That when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy,) then his widow shall be entitled in equity to dower out of the same land.

III. And be it further enacted, That when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced.

IV. And be it further enacted, That no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

V. And be it further enacted, That all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

VI. And be it further enacted, That a widow shall not be entitled to dower

out of any land of her husband when, in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

VII. And be it further enacted, That a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when, by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

VIII. And be it further enacted, That the right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid.

IX. And be it further enacted, That where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of, or in any land of her said husband, unless a contrary intention shall be declared by his will.

X. And be it further enacted, That no gift or bequest made by any husband to or for the benefit of his widow, of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will.

XI. Provided always, and be it further enacted, That nothing in this act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by, or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them.

XII. And be it further enacted, That nothing in this act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

XIII. And be it further enacted, That no widow shall hereafter be entitled to dower ad ostium ecclesiæ, or dower ex assensu patris.

XIV. And be it further enacted, That this act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January, one thousand eight hundred and thirty-four, and shall not give to any will, deed, contract, engagement, or charge, executed, entered into, or created before the said first day of January, one thousand eight hundred and thirty-four, the effect of defeating or prejudicing any right to dower.

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